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Recent Decisions

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RECENT DECISIONS

CONSTITUTIONAL LAW — THE PASSPORT ACT OF 1926 IMPOSING AREA RESTRICTIONS ON TRAVEL IS NOT AN IMPROPER DELEGATION OF LEGISLATIVE POWER, NOR DOES IT VIOLATE THE CONSTITUTIONAL RIGHT OF TRAVEL. *Zemel v. Rusk*, 85 Sup. Ct. 1271 (1965).

Louis Zemel's application for passport validation for travel to Cuba was refused by the Department of State. In an action against the Secretary of State and Attorney General for an injunction and a declaratory judgment that section 215 of the Immigration and Nationality Act of 1952[1] and section 211(a) of the Passport Act of 1926[2] are unconstitutional and that the Secretary's regulations restricting travel to Cuba are invalid, a three-judge District Court for the District of Connecticut upheld the Secretary's determination.[3] On appeal from a summary judgment for the defendants, Mr. Chief Justice Warren for the Supreme Court held that the Secretary of State had statutory authority under the Passport Act of 1926 to impose area restrictions on travel; that the statue did not involve an improper delegation of legislative power; and that the exercise of the authority did not violate appellant's constitutional right of travel.

The concept of freedom of travel was embodied in the Magna Carta.[4] Although the Constitution makes no mention of this freedom, the values envisaged in the concept became part of the American tradition at the time of independence. Article IV of the Articles

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[1] Section 215 provides:

> a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful. . . .
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> b) After such proclamation . . . has been made and published and while such proclamation is in force, it shall, . . . be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport. 66 Stat. 190, 8 U.S.C. § 1185 (1952).

[2] "[T]he Secretary of State may grant and issue passports, . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1964).

[3] Zemel v. Rusk, 228 F. Supp. 65 (D. Conn. 1964).

[4] "[I]t shall be lawful in future for anyone . . . to leave the Kingdom and return . . . except for a short period in time of war. . . ." Chapter 42 of the Magna Carta of 1215, as quoted from Jaffe, *The Right to Travel*, 35 FOREIGN AFFAIRS 17, 19 (1956).

of Confederation guaranteed the freedom of travel between the states.[5] This right of travel within the United States was later upheld by the Supreme Court in a number of decisions.[6]

Originally, the passport concept involved governmental permission to enter or leave a port or harbor, and was gradually extended to include generally permission of egress and of passage.[7] In international law, passports came to be recognized as letters of protection or safe conduct issued by the host country.[8] In the United States, the passport operated simply as a document of identity. It was not a prerequisite to entry, to departure, or to remaining in the country.[9] While possession of a passport facilitated travel abroad, it was not a necessity, and a traveler could well get along without one. This, as will be shown, was the case, with war-time exceptions, until 1941.[10]

In 1856 Congress enacted a statute granting the Secretary of State power to issue passports "under such rules as the President shall designate and prescribe."[11] That act, as amended,[12] remains effective today as the basic authority establishing the discretionary power of the President to promulgate rules and regulations governing passport issuance[13] and is the statutory authorization focused on by the court in the principal case. Congress, in 1918, passed a statute which prohibited departure from or entry into the United States without a valid passport during wartime or upon a presidential finding of necessity by proclamation.[14] During World War I the statute became operative through a proclamation by President

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[5] Article IV provided that, "[T]he people of each state shall have free ingress and regress to and from any other state. . . ."

[6] Edwards v. California, 314 U.S. 160 (1941); Williams v. Fears, 179 U.S. 270 (1900); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

[7] HUNT, THE AMERICAN PASSPORT 3 (1898).

[8] *Ibid.*

[9] 1958 REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 19; 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 435 (1942); see also Urtetiqui v. D'Arbel, 34 U.S. (9 Pet.) 692 (1835). In *Urtetiqui* the Supreme Court, in discussing the nature of an American passport, declared:

> There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect . . . It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and it is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. 34 U.S. at 699.

[10] Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252.

[11] Act of Aug. 8, 1856, ch. 127, § 23, 11 Stat. 52.

[12] REV. STAT. § 4075 (1875), 22 U.S.C. § 211 (1964).

[13] Note 2 *supra.*

[14] Act of May 22, 1918, ch. 81, § 2, 40 Stat. 559.

Wilson[15] and was rendered inoperative when the war was officially declared at an end.[16] During World War II, the 1918 Act was reenacted to become operative in time of war or proclamation of national emergency.[17] A presidential proclamation made this reenactment operative.[18] The Immigration and Nationality Act of 1952 repealed the revived 1918 statute, but retained similar provisions requiring passports for foreign travel "when the United States is at war or during the existence of any national emergency proclaimed by the President. . . ."[19] The national emergency proclaimed by President Truman during the Korean conflict[20] made the statute operative and it remains in effect today, requiring a passport for travel abroad.

A common assumption during the early history of passports was that the Secretary of State had absolute discretion with regard to the issuance of passports and that his decision was not subject to judicial review.[21] In the 1950's, however, a series of cases challenging the Immigration and Nationality Act of 1952[22] were decided by the District Court and the Court of Appeals for the District of Columbia establishing the requirements that individuals applying for passports must be afforded both procedural[23] and substantive[24] due process. In these decisions the right to travel was described variously as an attribute of "personal liberty"[25] and as a "natural right."[26] Regardless of how described, the right to travel was con-

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[15] Proclamation No. 1473, 40 Stat. 1829-31 (1918).

[16] Act of March 3, 1921, ch. 136, 41 Stat. 1359.

[17] Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252.

[18] Proclamation No. 2523, 6 Fed. Reg. 5821 (1941).

[19] Note 2 *supra.*

[20] Proclamation No. 3004, 18 Fed. Reg. 489 (1953).

[21] See *e.g.,* Perkins v. Elg, 307 U.S. 325 (1939) (Miss Elg, born in the United States of Swedish parents, had her passport revoked by the State Department on the ground that she was not an American citizen. Although the Court declared her a citizen, they refused to compel the Secretary of State to issue the passport); Miller v. Sinjen, 289 Fed. 388 (8th Cir. 1923). In *Miller* the court said:

> [A] finding that Plaintiff had ceased to be a citizen of the United States was not necessary to the action of the State Department in denying him a passport, for the reason that the granting of a passport by the United States is, and always has been a discretionary matter. . . . 289 Fed. at 394.

See also 61 YALE L. J. 171 (1951), for a discussion of other denials by the Secretary in the exercise of his unrestrained discretion.

[22] Note 1 *supra.*

[23] Kraus v. Dulles, 235 F.2d 840 (D.C. Cir. 1956); Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956); Nathan v. Dulles, 129 F. Supp. 951 (D.D.C.), *appeal dismissed,* 225 F.2d 29 (D.C. Cir. 1955); Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).

[24] Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955) which held that arbitrary action by Secretary of State in denying a passport does not satisfy the requirements of due process of law.

[25] Bauer v. Acheson, 106 F. Supp. 445, 451 (D.D.C. 1952).

[26] Shachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955), wherein the court stated: "The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under the law."

sidered a liberty within the purview of the fifth amendment[27] and as such was to be afforded the protections of substantive and procedural due process; that is, not only did the method of restraint on travel have to be fair and appropriate, but the content of executive criteria for travel control could not be unreasonable, and the question of reasonableness had to be considered in light of the high character of the liberty sought to be restrained.

Prior to the principal case, the freedom to travel abroad had been recognized by the United States Supreme Court in two important decisions, *Kent v. Dulles*[28] and *Aptheker v. Secretary of State*.[29] Though *Kent* was concerned with the authority delegated to the Secretary of State, the Court identified the right stating that it is a part of the "liberty" guaranteed by the fifth amendment, and therefore it may not be infringed without due process of law.[30] *Kent* involved the denial of passports under authority of section 51.135,[31] augmented by section 51.142,[32] of the passport regulations, whereby either an admission of present membership or refusal to take an oath with respect to past or present membership in the Communist Party resulted in automatic denial of a passport. Kent, having refused to take the oath, brought an action to declare the regulations unauthorized and invalid as infringing his first amendment freedoms of speech and association and as depriving him of his liberty without due process of law. Rather than decide these constitutional issues, the Court preferred to construe the statutes involved narrowly,[33] holding that neither the Passport Act of July 1926[34] nor the Immigration and Nationality Act of 1952[35] "delegate to the Secretary the kind of authority"[36] he had exercised. The Court in *Kent* concerned itself only with interpreting the express powers granted by Congress to the Secretary of State and did not consider the extent of Congress' constitutional powers to restrict travel.

In *Aptheker v. Secretary of State*[37] the Court was directly confronted with the constitutional limits of travel restrictions occasioned

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[27] See Fahy, *The Right to Travel*, 6 NATURAL L.F. 109 (1961).

[28] 357 U.S. 116 (1958).

[29] 378 U.S. 500 (1964).

[30] Kent v. Dulles, 357 U.S. 116, 125 (1958).

[31] 22 C.F.R. § 51.135 (1952).

[32] 17 Fed. Reg. 8014 (1952).

[33] Kent v. Dulles, 357 U.S. 116, 130 (1958); *accord*, Dayton v. Dulles, 357 U.S. 144 (1958).

[34] Note 2 *supra*.

[35] Note 1 *supra*.

[36] Kent v. Dulles, 357 U.S. 116, 129-30 (1958).

[37] 378 U.S. 500 (1964).

by the requirements of national security.[38] Petitioners Aptheker and Flynn, admittedly active members of the Communist Party, were notified that their passports were being revoked under authority of section 6 of the Subversive Activities Control Act of 1950 making it illegal for all members of registered communist organizations to use or attempt to use passports.[39] In a declaratory judgment blocking the Secretary of State's action of revocation, Justice Goldberg, citing first amendment precedents,[40] declared section 6 unconstitutional because it "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the fifth amendment."[41] The significance of *Aptheker* lies in its *seeming* application of first amendment rules[42] to a case involving the right to travel, a right that arises inferentially out of the "liberty" guaranteed in the fifth amendment[43] and not out of the first amendment.[44] This decision has been interpreted to imply that, even though the right to travel is protected by the fifth amendment, it is such an important right that statutes restricting it should be scrutinized under first amendment tests.[45] A more conservative reading of *Aptheker* would emphasize the relation between travel and the first amendment, thereby avoiding the pronouncement of a new constitutional doctrine. This construction can be postulated on the majority's observation that "freedom of travel is a constitutional liberty closely related to rights of free speech and association,"[46] and the

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[38] *Id.* at 505.

[39] 64 Stat. 993 (1951), 50 U.S.C. § 785 (1951).

[40] 378 U.S. at 508.

[41] *Id.* at 505.

[42] See Justice Clark's dissent noting the differences in testing a statute for vagueness between cases arising under the first amendment and cases arising under the fifth amendment. *Id.* at 521.

[43] Kent v. Dulles, 357 U.S. 116, 125 (1958); CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 188-98 (1956): In Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955), Judge Fahy of the United States Court of Appeals for the District of Columbia speaks of the right to travel as a "natural right" guaranteed by the fifth amendment.

[44] *Contra,* Judge Wyzanski, Chief Judge of the District Court of Massachusetts, has written that the freedom of expression and communication involved in travel are facets of freedom of speech. Wyzanski, *Freedom to Travel,* Atlantic Monthly, 66, 68 (Oct. 1952). "The right to travel could be treated as a facet of free expression and communication under the First Amendment. . . ." 57 MICH L. REV. 119, 120-21 (1958). American Civil Liberties Union views the freedom of travel as an integral element of the first amendment. Hearings on S. 2770, 3998, 4110, 25.4137 Before the Senate Committee on Foreign Relations, 85th Cong., 2d Sess. 128 (1958). "The Committee . . . believes that this freedom of travel is a right closely related to first amendment freedoms and that it accordingly should be denied only when its free exercise would dangerously impinge upon national interests of the most pressing urgency." 1958 REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 35.

[45] Comment, 78 HARV. L. REV. 195, 196-98 (1964).

[46] Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964).

fact that section 6, by making membership in a "communist organization" grounds for passport denial, directly infringed the first amendment freedom of association.[47] Regardless which reading is given the decision, *Aptheker* clearly indicated that, even if a federal statute giving the Secretary of State the power to deny passports is precise, it must be drawn narrowly so as not unduly to infringe the citizen's right to travel.

Both *Kent* and *Aptheker* concerned restrictions placed on individuals or groups because of their political beliefs or associations. In *Zemel v. Rusk*,[48] however, the entire citizenry is restricted in the exercise of their right to travel. The ban on travel to Cuba does not depend on individual beliefs or associations; rather, it depends on foreign policy considerations affecting all citizens.[49] On this basis, Chief Justice Warren, speaking for a six-man Court majority, factually distinguished the principal case from *Kent* and *Aptheker* and upheld the Secretary of State's right to impose area restrictions on travel.[50]

The first issue resolved by the Court in *Zemel* was whether the Secretary of State was statutorily authorized by Congress to refuse to validate the passports of United States' citizens for travel to Cuba.[51] Chief Justice Warren noted that the Secretary, acting under the authority granted by Congress in the Passport Act of 1926,[52] had restricted travel to Ethiopia, Spain and China in the 1930's, and later to many communist countries[53] and by not acting, Congress implicitly approved such administrative practices.[54]

The Court rejected appellant's assertion that he was being denied rights guaranteed by the first amendment by reasoning that

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[47] *Id.* at 518.

[48] 85 Sup. Ct. 1271 (1965).

[49] *Id.* at 1279.

[50] Area restrictions on travel arising out of a State Department requirement of passport validation for travel to "Albania, Bulgaria, and those portions of China, Korea and Viet-Nam under Communist control" (33 Dep't State Bull. 77 n. 3 (1955)) were judicially challenged in a trilogy of cases dealing with individuals wishing to travel to Communist China. The United States Court of Appeals for the District of Columbia upheld the right to impose area restriction in three separate cases involving a scholar, a newspaperman, and a congressman. The United States Supreme Court denied certiorari in all three cases. Porter v. Herter, 278 F.2d 280 (D.C. Cir.), *cert. denied,* 364 U.S. 837 (1960); Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied,* 361 U.S. 918 (1959); Frank v. Herter, 269 F.2d 245 (D.C. Cir.), *cert. denied,* 361 U.S. 918 (1959).

[51] Zemel v. Rusk, 85 Sup. Ct. 1271, 1274 (1965).

[52] 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1965).

[53] Zemel v. Rusk, 85 Sup. Ct. 1271, 1276-79 (1965).

[54] The Court did not decide whether section 210 of the Immigration and Nationality Act of 1952 (Note 1 *supra*) and the still outstanding presidential proclamation of national emergency pursuant thereto (Note 20 *supra*) would alone be sufficient to make travel in violation of the area restriction unlawful. *Ibid.*

the diminishing of a citizen's opportunity to gather information, though to be considered in determining whether appellant was denied due process of law, is simply not a first amendment right.[55] In the words of the Chief Justice: "The right to speak and publish does not carry with it the unrestrained right to gather information."[56] Instead, the right to travel allegedly denied appellant was treated as a "liberty" guaranteed by the fifth amendment and "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."[57] Determining that the requirements of due process are a function "of the extent of the necessity for the restriction,"[58] the Court answered the fifth amendment issue by deciding that the interest of the government in precluding the involvement of "the nation in dangerous international incidents"[59] that "might" be caused by American citizens traveling to Cuba outweighed the interests of passport applicants in freedom of travel. Added to the government's side of the scale was the fact that the Executive has the right to take all steps necessary, except an act of war, to protect the rights of American citizens in foreign countries.[60]

Finally, the Court decided that the Passport Act of 1926 does contain "sufficiently definite standards" for the formulation of travel restrictions when it is considered that "Congress in giving the Executive authority over matters of foreign affairs must of necessity paint with a brush broader than that it customarily wields in domestic areas."[61]

The Court placed critical reliance on factually distinguishing *Zemel* from *Kent* and *Aptheker,* but the distinctions may be superficial. It is true that a more or less general ban on travel to a particular country has an impact different from that of denying particular individuals the right to travel anywhere outside the country. Thus the justification for, and the consequences of, the power to restrict passport use through area restrictions presents a different question from the passport denial problems in *Kent* and *Aptheker.* However, the right of free movement is the constitutional value being regulated; the only difference is the manner and degree of the restriction.

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[55] Zemel v. Rusk, 85 Sup. Ct. 1271, 1281 (1965).

[56] *Ibid.*

[57] 85 Sup. Ct. at 1279.

[58] *Ibid.*

[59] 85 Sup. Ct. at 1280.

[60] REV. STAT. § 2001 (1875), 22 U.S.C. § 1732 (1958).

[61] 85 Sup. Ct. at 1281.

The passport regulations invalidated in *Kent* and *Aptheker* were alleged to be necessary to forestall the adverse effects on foreign countries of travel by political dissenters. This extranational context would seem analogous to that of the principal case. Moreover, it is difficult to rationalize why the presidential authority over matters of foreign affairs should be limited by the rights of the political dissenter to hold nonconforming opinions and not limited by the right to develop those opinions.

Kent and *Aptheker* hold that travel cannot be restricted for mere belief or association; yet the authority upheld in *Zemel* — to impose area bans with exceptions — permits this very thing in those areas of the world where the Secretary deems travel by American citizens inimical to government interests. The Secretary can, by changing the number of nations to which travel is precluded and by changing the excepted class of persons for whom travel to such nations is permitted, approach the absolute discretionary control over travel that the Court held violative of the Constitution in *Kent.*

It has been argued that intelligent electoral judgment on foreign affairs is a function of the availability of informed viewpoints from sources independent of the federal government,[62] *i.e.,* knowledge is an element of a voter's judgment; he should be free to learn first-hand. Authorization of area restrictions with exceptions permits the Executive to grant passports to those favorable to Administration policy and to deny passports to critics, thereby undermining the democratic process which the guarantees of free inquiry were intended to preserve.[63] Such curtailment of free investigation necessarily results in a substantial diminution of the opportunity to arrive at an intelligent judgment and would seem to infringe on the appellant's first amendment rights contrary to the pronouncements of the Court in the principal case.

Zemel was primarily concerned with the power of the President to restrict travel as a necessary part of his constitutional duty to control foreign relations — but more was involved because a basic liberty of a citizen was being curtailed. Where the exercise of the

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[62] See CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 195-96 (1956):

> Each inroad upon the freedom of travel weakens the base upon which free society necessarily depends. Unless the citizenry has at least access to the available fund of information with which to test for itself the soundness of governmental decisions, the structure of a free society is impaired. The right to know and the right to travel represent freedoms long taken for granted by Ameicans. 1958 REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 37.

[63] See Pollitt and Rauh, *Restrictions on the Right to Travel,* 13 W. RES. L. REV. 128 (1961).

President's foreign relations power touches personal liberties, it is subject to the due process clause of the fifth amendment.[64] In *Kent*, the Supreme Court said due process requires that any new regulation of the right to travel should come from Congress.[65] *Zemel* involved no regulation pursuant to new Congressional legislation; the statute relied on in *Zemel* is the same as that narrowly construed by the Court in *Kent*.[66]

The finding in the principal case of Congressional authorizations of area restrictions does an injustice to the *Kent* approach to statutory construction. There the Supreme Court strictly construed the Passport Act of 1926[67] and found no established prior administrative practice of denying passports on the basis of individual beliefs sufficiently substantial to warrant the conclusion of implied legislative approval.[68] There seem to be even fewer instances of administratively-imposed area restrictions prior to 1926; they appear explicitly for the first time in a 1938 Presidential authorization to the State Department.[69] It is difficult to attribute to Congress a silent acceptance of a policy that was not applied on any widespread scale before 1952.[70] It is particularly difficult in view of the fact that following the Court's decision in *Kent*, President Eisenhower asked Congress for authority to impose area restrictions[71] and Congress has thus far failed to grant such authority.[72]

Even if legislative intent can validly be imputed by Congressional failure to act in the face of administrative interpretation, the fact that the Court recognized the constitutional rights involved should necessitate that the challenged authorization be pursuant to express Congressional legislation as recognized by Justice Black in

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[64] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955).

[65] The Supreme Court found that if the right of travel is "to be regulated, it must be pursuant to the law-making functions of the Congress." Kent v. Dulles, 357 U.S. 116, 129 (1958).

[66] 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1926).

[67] Kent v. Dulles, 357 U.S. 116, 130 (1952).

[68] *Id.* at 128.

[69] Exec. Order No. 7856 3 Fed. Reg. 687 (1938).

[70] See 1958 REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL; Pollitt and Rauh, *Restrictions on the Right to Travel*, 13 W. RES. L. REV. 1128 (1962).

[71] [T]he Secretary should have clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States. 104 CONG. REC. 13046 (1958).

[72] A search of U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS has revealed no such Congressional grant of authority.

his dissent in *Zemel*.[73] A number of studies have been made of the statutes, regulations and procedures involved in the processing of passports,[74] and most of these have recommended that, at the very least, the discretionary authority given the Secretary in issuing passports should be specifically defined.[75]

In theory, area prohibitions on travel apply equally to *all* American citizens, and no constitutional problems based upon the reasonableness of classification, or discrimination against classes, groups, or individuals are raised under the fifth amendment, provided the action is not so arbitrary as to be wholly capricious. However, in most cases where the Department of State has invoked area restrictions, they have also made numerous exceptions for persons whose travel is found to be in the national interest.[76] Unanswered in *Zemel* is whether such exceptions themselves should be held discriminatory and area control held invalid in those situations.

What remains of the constitutionally protected freedom of the United States citizens to travel abroad after *Zemel*? It is generally conceded that reasonable limitations can be imposed on constitutionally protected rights, but there is considerable difficulty in defining the boundaries of appropriate restrictions. It appears clear that the Executive does not have inherent power to regulate the right to travel abroad.[77] Congress does have the power to regulate the right to travel.[78] In *Aptheker*[79] the Supreme Court stated that the

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[73] Zemel v. Rusk, 85 Sup. Ct. 1271, 1282 (1965). Generally, when the President needs additional powers to carry out legitimate policies of the government, the customary approach is through special purpose legislation. CORWIN, THE PRESIDENT: OFFICE AND POWER, 191-92 (4th ed. 1957).

[74] See *e.g.*, CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 162-213 (1956); 1957 REPORT OF THE UNITED STATES COMMISSION ON GOVERNMENT SECURITY; 1958 REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL.

[75] "Congress should enact legislation defining the standards and criteria of the passport security program." 1957 REPORT OF THE UNITED STATES COMMISSION ON GOVERNMENT SECURITY at 475. "[T]he Committee has concluded, on balance, that the authority to prohibit travel by all United States citizens in areas designated by the Secretary of State is a necessary instrument to advance the national interest, and it recommends legislation to clear up any doubt as to the possession by the Secretary of State of such authority. . . ." 1958 REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 55.

[76] A companion press release to the Department of State's area prohibition on passport validation for travel to Cuba provided for exceptions to "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests." Zemel v. Rusk, 85 Sup. Ct. 1271, 1274 (1965).

[77] If such power exists in the Executive, it would arise out of the power to conduct foreign affairs. Chicago and Co. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).

[78] The Supreme Court has found that if the right to travel is "to be regulated, it must be pursuant to the law-making functions of the congress." Kent v. Dulles, 357 U.S. 116, 129 (1958).

[79] Aptheker v. Secretary of State, 378 U.S. 500 (1964).

proposition that Congress has power to safeguard the national security "is obvious and unarguable."[80] *Zemel* indicates that the same is true of the related power of Congress to conduct foreign affairs and that Congress, within that framework may delegate to the Executive the power to regulate the right to travel.

Regulation of the right to travel must, however, be constitutional. Furthermore, "if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests."[81] The problem becomes one of balancing interests and is closely related to the similarly difficult question of determining what restraints may be imposed on freedom of speech, a parallelism which has been recognized by the Supreme Court.[82] The question of whether or not a given regulation of the right to travel is constitutional is to be answered by balancing the freedom to travel against the utility of the means employed to achieve the intended purpose.[83] In *Kent*[84] the restrictions on the individual's right to travel were not justified by their alleged purpose. In *Aptheker,*[85] the statute itself authorized a sweeping restriction of travel which the Court said was not justified by the limited evil being pursued. In *Zemel,* the utility of area restriction on passport issuance in the administration of foreign policy was found by the Court to outweigh the freedom to travel. The present situation in Cuba, and possibly politically embarrassing events which could transpire if American citizens were to travel there, justified, in the eyes of the Supreme Court, the restriction on the freedom to travel.

The resultant Court approach to restrictions on the right to travel abroad seems to be to allow the Executive discretion under present statutes by continually refusing to declare the wide statutory grant of authority to it unconstitutional, while keeping in mind that particular exercises of the discretion might be termed arbitrary and therefore invalid as determined by subsequent judicial proceedings.

Ronald C. Butz

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[80] *Id.* at 509.

[81] Kent v. Dulles, 357 U.S. 116, 129 (1958).

[82] *Id.* at 509.

[83] The test as applied by the Court to the challenged statute in *Aptheker* is a derivation of that used in Shelton v.Tucker, 364 U.S. 479 (1960):

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. 364 U.S. at 488.

[84] Kent v. Dulles, 357 U.S. 116 (1958).

[85] Aptheker v. Secretary of State, 378 U.S. 500 (1964).

AUTOMOBILES — SERVICE OF PROCESS — COLORADO NONRESIDENT MOTORIST ACT UNCONSTITUTIONAL. *Clemens v. District Court,* 390 P.2d 83 (Colo. 1964).

In *Clemens v. District Court,*[1] the Colorado Nonresident Motorist Act[2] was declared unconstitutional as violative of the due process clauses contained in the state and federal constitutions.[3]

Defendant Clemens was involved in an automobile accident in Denver while a resident of Colorado. At the time of the accident he was operating an automobile loaned to him by the owner, defendant Bowers, a resident of South Dakota. The defendants were served with process pursuant to the provisions of the Colorado Nonresident Motorist Act,[4] the substituted service being issued from the Secretary of State's office to to Clemens' "last known address," a hotel in Tucumcari, New Mexico, and Bowers' address in Aberdeen, South Dakota. At the time of issuance of the substituted service Clemens had changed his residence to Utah and never received a copy of the substituted service; Bowers, however, received the copy mailed to her.

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[1] 390 P.2d 83 (Colo. 1964). The petitioners in this action will be referred to throughout as defendants, their position in trial court.

[2] COLO. REV. STAT. §§ 13-8-1 to -6 (1963).

[3] The court did not specifically cite either the COLO. CONST. art. II, § 25 or the fourteenth amendment to the United States Constitution. Since the defendants argued that Colorado and Federal due process were violated by the Colorado Nonresident Motorist Act, it must be assumed that the court was in agreement. The COLO. CONST., art. II, § 25 provides: "No person shall be deprived of life, liberty, or property, without due process of law." The fourteenth amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

[4] COLO. REV. STAT. § 13-8-4 (1963) provides:

> Service of process. — When any civil action which pertains to an accident is commenced in any court of record in this state, the court shall, upon verified motion giving the last known address of the defendant and setting forth the circumstances by which the plaintiff is entitled to serve the secretary of state in accordance with the provisions of this article and upon finding that such service is proper, enter an order ex parte setting forth the last known address of the defendant and authorizing service to be made on the secretary of state. Service shall be made by delivering two copies of the process, complaint, motion and order of court to the secretary of state, his deputy or assistant, together with a fee of five dollars, which shall be taxed as part of the cost of the proceedings. Notice of such service and a copy of each instrument so served shall forthwith be sent by the secretary of state by certified or registered mail, addressed to the defendant at his address given in the order of court, with return receipt requested. Promptly after such mailing the secretary of state shall file with the clerk of the court a certificate showing such mailing. Service shall be complete thirty days after service of process on the secretary of state as provided in this section.

Within the thirty days allowed before service became final Bowers and Clemens, whom Bowers had apparently notified, appeared and moved that service be quashed.[5] Upon the denial of their motion the defendants instituted an original action before the supreme court to obtain a rule to show cause why the service should not be quashed.[6]

It was the contention of Bowers that that provision of the Colorado Nonresident Motorist Act which defined the owner of an automobile as a driver[7] exceeded the limitations of due process in its attempt to exercise personal jurisdiction over one who had "not had sufficient affiliation or 'minimal contact' with that state which are a prerequisite to its exercise of power over him."[8]

Clemens contended that the attempt by the act to provide substituted service on residents of Colorado absent from the state for ninety days[9] was in violation of his constitutional rights. Although recognizing that amenability to suit during sojourns without the state is an incident of residence or domicile within the state, Clemens argued that residence at the time of the accident could not be deemed conclusive of residence at the time of substituted service. The statute construed in this manner would conflict with the

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[5] Since no provision for a motion to quash service of process exists in the Colorado Rules of Civil Procedure it must be assumed that the motion by the defendants was a 12(b) motion to dismiss for lack of jurisdiction over the person or for the insufficiency of service of process or both.

[6] COLO. R. CIV. P. 106, which abolished the various forms of writs, provides in subsection (a) (4) for a rule to show cause. COLO. R. CIV. P. 116(a) provides for original jurisdiction by the supreme court and authorizes relief in the nature of prohibition. It would appear, since the defendants entitled their petition to the supreme court as "Complaint for order to show cause or relief in the nature of prohibition," that the defendants were unsure of which rule was applicable.

[7] COLO. REV. STAT. § 13-8-1 (1963) provides:

> Definition of terms. — (1) When used in sections 13-8-1 through 13-8-6, the following terms shall have the following meanings: (2) A "driver" is the owner or operator of a motor vehicle.

It would appear that the obvious intention of the legislature was to include owners of vehicles who were not driving at the time of an accident within the scope of the act. See note 17 *infra* for further discussion of this point.

[8] Brief for Plaintiffs, p. 4, Clemens v. District Court, 390 P.2d 83 (Colo. 1964).

[9] COLO. REV. STAT. § 13-8-2 (1963) provides:

> Appointment of agent by resident. — If a resident who is the driver of a motor vehicle involved in an accident thereafter remains away from this state for a period of ninety days, said driver shall be deemed to have appointed the secretary of state to be his true and lawful attorney upon whom may be served process in any civil action against him pertaining to such accident, and any such process served as provided in section 13-8-4 shall be of the same legal force and validity as if served on such resident driver personally within this state.

principle that a state's authority to subject an absent resident to suit ends when that resident makes his domicile or residence in another state.[10] Furthermore, the defendant argued, it would be possible under the statute to invoke the substituted service mechanism even when the defendant could be found and personally served within the state.[11] For these reasons the defendant asked the court to hold the statute unconstitutional as "arbitrary, unnecessary and inappropriate to the object of subjecting to suit residents of Colorado absent from the state for ninety days or more."[12]

Both defendants further urged that Section 13-8-4[13] prescribing the method of effecting substituted service was unconstitutional as applied to them. Since the statute did not require that the requested *return* receipt be filed before deeming the substituted service complete, the defendant's believed it possible for service to be affected regardless of whether notice had been mailed to the defendant's last known address and regardless of whether the defendant had received notice of the suit.[14] Thus, it was contended, the statute failed to contain provisions making it reasonably probable that the defendant would receive actual notice of the suit, and under the principle established in *Wuchter v. Pizzuti*[15] the statute was in conflict with the requirements of due process.

Justice Hall, in writing the court's opinion, accepted petitioner Bowers' contention that she had not sufficient "minimal contact" with Colorado to warrant subjecting her to the court's jurisdiction. Regarding that portion of the act which defined "driver" as the

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[10] Milliken v. Meyer, 311 U.S. 457 (1940). Although the court did not discuss the situation suggested, *i.e.*, that the absent defendant had sought to establish residence or domicile in another state, it would appear that the corollary drawn by the defendant is valid. The question would always turn, of course, upon the incidents which establish residence or domicile.

[11] Brief for Plaintiffs, p. 7, Clemens v. District Court, 390 P.2d 83 (Colo. 1964). The defendants relied upon the cases of Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. 614 (1904) and Bardwell v. Collins, 44 Minn. 97, 46 N.W. 315 (1890). The Supreme Court stated the corollary when it allowed substituted service upon a showing of diligence by plaintiff in his search for a resident defendant. Jacobs v. Roberts, 223 U.S. 261 (1912).

[12] Brief for Plaintiffs, p. 9, Clemens v. District Court, 390 P.2d 83 (Colo. 1964).

[13] COLO. REV. STAT. § 13-8-4 (1963), *supra* note 4.

[14] Brief for Plaintiffs, *supra* note 12 at p. 9.

[15] 276 U.S. 13, 24 (1927); The Supreme Court noted the general trend of authority toward sustaining the validity of substituted service of process ". . . if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice. . . ."

owner or operator of the motor vehicle[16] as a complete fiction,[17] Justice Hall launched into a consideration of the history of extra-territorial jurisdiction. *Pennoyer v. Neff*,[18] he noted, which had limited jurisdiction to persons and property within the forum, was no longer followed. Instead, when a state has a legitimate interest, a nonresident can be subject to suit if he has had "certain minimal

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[16] COLO. REV. STAT. § 13-8-1(2), (1963), *supra* note 7.

[17] The obvious intent of the legislature in section 13-8-1 was to include within the scope of the statute nonresident owners of vehicles who had consented to their use by others in Colorado. The history of the Colorado Nonresident Motorist Act supports such a conclusion. The original legislation establishing the act was adopted in 1937, Colo. Sess. Laws 1937, ch. 92, pp. 323-25, and was patterned after the Massachusetts Act interpreted in Hess v. Pawloski, 274 U.S. 352 (1927).

The Colorado Supreme Court first interpreted the 1937 act in Carlson v. District Court, 116 Colo. 330, 140 P.2d 525 (1947). The court therein construed the statute strictly, as being in derogation of the common law and refused to allow substituted service on a resident who, subsequent to an accident, has established his residence in another state. In 1953 the act was challanged by Federal District Court, Larsen v. Powell, 117 F. Supp. 239 (D. Colo. 1953), and Judge Knous, relying upon the *Carlson* decision, strictly construed the statute as being applicable solely to those engaged in the actual operation of the motor vehicle at the time of the accident. Two decisions in 1954 turned upon the *Carlson* decision: Warwick v. District Court, 129 Colo. 300, 269 P.2d 704 (1954), and Clark v. Reichman, 130 Colo. 329, 275 P.2d 952 (1954), held the act inapplicable to an operator resident at the time of an accident but who later became nonresident before substituted service was attempted.

The decisions in these cases helped prompt legislative amendments. In 1953 the scope of the act was enlarged to include accidents occurring from the operation of motor vehicles anywhere within the state. Colo. Sess. Laws 1953, ch. 44, p. 143. Operation of a motor vehicle within the scope of employment by agents, servants, and other employees was deemed by the legislature in 1957 as subjecting the owner to substituted service, Colo. Sess. Laws 1957, ch. 83, p. 143. And, finally, the act was amended to its pre-*Clemens* form in 1961, Colo. Sess. Laws 1961, ch. 75, pp. 244-46.

Each time the statute was amended its scope was enlarged, and it is inconceivable that the legislature should narrow the scope of the 1957 amendment by excluding from coverage an absent owner whose agent, servant, or employee was allowed to operate an automobile and to inflict injuries thereby. If such reasoning is applicable to the absence of an intent to exclude the nonresident principal, master, or employer from the scope of the statute, it should not be difficult to define an intent to include nonresident owners who had consented to the operation of an automobile within Colorado by someone other than an agent, servant, or employee.

The mere fact that an owner had no contacts with Colorado did not prevent the supreme court from upholding substituted service in Morrison v. District Court, 143 Colo. 514, 355 P.2d 660 (1960). There the court deemed the family relationship between a father and son sufficient to subject the father to substituted service of process.

Furthermore, if the method adopted by the legislature to enhance the scope of the statute was based upon a fiction it nevertheless attempted to remedy the unfortunate situation whereby an innocent resident of Colorado could be denied satisfaction from certain classes of nonresident tortfeasors. Indeed, the orthodoxy professed by the court with respect to section 13-8-1 would have been more haecceitas had it also rejected the basic fiction that a nonresident who operates a motor vehicle in Colorado consents to constitute the secretary of state as his agent for service of process.

[18] 95 U.S. 714 (1877). Therein the court stated what came to be known as the physical power doctrine.

> . . . every state has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory both personal and real may be acquired, enjoyed, and transferred. [But] no state can exercise direct jurisdiction and authority over persons or property without its territory. 95 U.S. at 722.

contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (Citations omitted.)[19] Nevertheless, the limitations on the territorial power of a state to subject a nonresident to its jurisdiction had not been extinguished. Indeed, "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." (Citations omitted.)[20]

Since the court had already determined as a matter of fact that defendant Bowers had no contacts with Colorado,[21] the only conclusion of law which could follow was that the Act was unconstitutional: "Provisions of Chapter 75 providing for substituted service on owners with no contacts are lacking in due process, unconstitutional and void."[22]

The court ignored Clemens' argument concerning the invalidity of section 13-8-2,[23] which purported to subject residents absent for ninety days from the state to substituted service of process. It is at least unfortunate that the court failed to consider the method adopted by the legislature to obviate the deficiences in the 1937 Act[24] which had left residents removed from the state beyond the scope of the statute.[25]

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[19] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[20] Hanson v. Denckla, 357 U.S. 235, 251 (1957).

[21] Clemens v. District Court, 390 P.2d 83, 84 (Colo. 1964). The court there stated:

> In the case before us, Barbara Bowers has never been a resident of Colorado; she owns a motor vehicle; she did not drive the vehicle; Clemens drove the same for his own purposes, not as agent for Barbara or for her benefit or in her behalf. She was not in the vehicle at the time of the accident and for all that appears in the record was not even in Colorado.

And at page 85,

> The language in Chapter 75 providing for substituted service of process is broad enough to warrant resort to such service on a nonresident owner of a motor vehicle involved in an accident in Colorado where the owner has never been in Colorado and when the owner has no contacts or ties, minimal or otherwise, with Colorado — the status of Barbara Bowers, defendant in the trial court.

It is interesting to note in defendant Clemens' affidavit, which accompanied the petition to the supreme court, the statement, "I was alone in the vehicle at the time of the accident as Barbara Ann Bowers had returned to South Dakota several days before the accident happened." It would appear that the factual conclusion reached by the court that Barbara Bowers had had no contact with Colorado was at last in part erroneous. Whether the contact with Colorado which was present would constitute sufficient "minimal contact" to warrant subjecting defendant Bowers to the court's jurisdiction is a question to which the could should have addressed itself. For further discussion of this point see pages 230 *infra.*

[22] 390 P.2d at 86.

[23] COLO. REV. STAT. § 13-8-2 (1963), *supra* note 8.

[24] Colo. Sess. Laws 1937, ch. 92, pp. 323-25.

[25] Clark v. Reichman, 130 Colo. 329, 275 P.2d 952 (1954); Warwick v. District Court, 129 Colo. 300, 269 P.2d 704 (1954); Carlson v. District Court, 116 Colo. 330, 180 P.2d 525 (1947).

Nevertheless, the court did not address itself to Clemens' argument before it proceeded with a discussion of the procedures prescribed by section 13-8-4[26] for effecting substituted service of process.

Justice Hall began by announcing the well established principle that the due process associated with substituted service of process contemplates notice of impending proceedings.[27] No serious challenge of the constitutionality of subjecting a non-resident motorist to the jurisdiction of the state's courts could be maintained.[28] But the methods prescribed for *effecting* that jurisdiction through substituted service of process must, "in order to be valid, contain a provision making it reasonably probable that notice of the service . . . will be communicated to the nonresident defendant who is sued."[29]

Placing particular reliance on the fact that the statute held constitutional in *Hess v. Pawloski*[30] provided for notice sent by registered mail and the filing of the return receipt with the complaint, the court considered the degree of probability under the Colorado statute of notice reaching the defendant. In *Wuchter*[31] the United States Supreme Court had ruled unconstitutional a statute which made no provision for notifying a defendant subsequent to service on the secretary of state. So also, the Maryland

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[26] COLO. REV. STAT. § 13-8-4 (1963), *supra* note 4.

[27] Clemens v. District Court, 390 P.2d 83, 86 (Colo. 1964).

[28] *Id.* at 87. The court relied upon the Supreme Court's holding in Hess v. Pawloski, 274 U.S. 352 (1927).

[29] Clemens v. District Court, 390 P.2d 83, 86 (Colo. 1964), citing Wuchter v. Pizzutti, 276 U.S. 13, 48 (1927).

[30] 274 U.S. 352 (1927). The Massachusetts statute involved in this case provided in pertinent part:

> Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with declaration. MASS. GEN. LAWS, ch. 90, ch. 431, § 2 (1923).

[31] Wuchter v. Pizzutti, 276 U.S. 13 (1927). The New Jersey statute provided:

> From and after the passage of this act any chaffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved. PUBLIC LAWS N.J. ch. 232, § 1 (1924), p. 18.

Supreme Court had rejected a statute as providing insufficient probability of notice reaching the defendant where the statute deemed as conclusive of the defendant's "last known address" the address given by him at the time of the accident.[32] Additionally, the Colorado court construed the language of two earlier decisions, one by the Supreme Court[33] and one by a state court,[34] as requiring a method of substituted service which would be as effectual in imparting notice as would be personal service.

Thus, the court, not unmindful that many courts had held statutes similar to Colorado's constitutional, believed its only course for decision was to find the methods prescribed for substituted service invalid. Deeming the fact that Clemens had not received notice of the impending suit as conclusive of merely fifty percent probability that notice would actually be imparted to a prospective defendant, the court concluded: "Procedures only fifty percent effective cannot be held as reasonably calculated to bring notice to the defendant or to constitute due process."[35]

From the foregoing restatement of the court's opinion it is apparent that the court accepted two of the three arguments advanced by the defendants: that is, in its first holding, the court deemed as unconstitutional the legislative attempt to subject a nonresident owner of an automobile driven by a permittee to substituted service of process; in its second holding, the court considered the act constitutionally deficient because it failed to provide reasonable probability of notice reaching the nonresident defendant.[36] The court's

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[32] Grote v. Rogers, 158 Md. 685, 149 Atl. 547 (1930). The Maryland statute provided:

> Notice of such service and a copy of the process shall forthwith be sent by registered mail by the plaintiff or his attorney to the defendant at his address as specified in such process; and such address shall be conclusively presumed to be correct if it be an address given by the defendant in any proceeding before any court magistrate or justice of the peace, or any police officer or deputy or any other person, at or subsequent to the collision or accident aforesaid, or if it be the latest address appearing upon the records of the Commission of Motor Vehicles . . . or other officer charged with the administration of the motor vehicle laws of the State in which any motor vehicle is registered in the name of such defendant. . . . MD. ACTS ch. 254, (1929), cited in Grote v. Rogers, *supra* at 548.

[33] McDonald v. Mabee, 243 U.S. 90 (1917), cited in Clemens v. District Court, 390 P.2d 83, 89 (Colo. 1964); Justice Holmes stated therein:

> To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done. 243 U.S. at 92.

[34] Kurrilla v. Roth, 132 N.J.L. 213, 38 A.2d 862 (1944), cited in Clemens v. District Court, 390 P.2d 83, 90 (Colo. 1964). The court therein placed particular emphasis upon the impartation of notice.

[35] Clemens v. District Court, 390 P.2d 83, 90 (Colo. 1964).

[36] This discussion assumes that the due process requirements would be the same regardless of whether the defendant is a nonresident or a resident absent from the state for ninety days or more.

holding on these two issues made it unnecessary to consider Clemens' argument that section 13-8-2 of the Colorado Revised Statutes subjecting residents absent from Colorado for ninety days or more to substituted service of process was unconstitutional.

I. SERVICE ON NONRESIDENT OWNERS NOT PRESENT OR OPERATING AUTOMOBILE AT TIME OF ACCIDENT

The statement by the court in its first holding of the law governing the degree of contact which is requisite when subjecting nonresidents to in personam jurisdiction is incapable of refutation. The court's conclusion of fact as well as its application of law to that conclusion of fact, however, seems poorly founded.

The major objection implicit in the court's first holding lies in its statement of the question presented for determination; *i.e.*, defendant Bowers' contention that she has not had sufficient conact with Colorado to subject her to substituted service of process. The court stated that the question to be resolved was whether provisions for substituted service of process on owners of automobiles who have no contacts with Colorado are violative of due process.[37] Another writer,[38] suggesting that the court begged the question, stated that the question before the court was "whether the defendant Bowers had sufficient contacts with the state so as to make substituted service of process on her permissible within the limits of due process."[39]

An analysis of the cases cited by the court[40] clearly illustrates that the "minimal contacts" discussed therein involved a thorough consideration of the factual situation which gave rise to the state's seeking to subject the objecting parties to in personam jurisdiction. Many writers have already discussed these cases fully,[41] and this writer could add little to that discussion. Nevertheless, the court's

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[37] Clemens v. District Court, 390 P.2d 83, 85 (Colo. 1964). See textual discussion pp. 217-18 *supra* and citations therein.

[38] Clifford, *Colorado's "Short-Arm" Jurisdiction,* 37 U. COLO. L. REV. 309, 313 (1965).

[39] *Ibid.*

[40] See textual discussion *supra* pp. 217-18.

[41] Briggs, *Jurisdiction by Statute,* 24 OHIO ST. L.J. 223 (1963); Campbell, *Jurisdiction Over Nonresident Individuals and Foreign Corporations: the Privileges and Immunities Clause,* 36 TUL. L. REV. 663 (1962); Ehrenzweig, *Pennoyer is Dead — Long Live Pennoyer,* 30 ROCKY MT. L. REV. 285 (1958); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts,* 25 U. CHI. L. REV. 569 (1958); Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction,* 44 IOWA L. REV. 249 (1959); Wilson, *In Personam Jurisdiction Over Nonresidents: An Invitation and a Proposal,* 9 BAYLOR L. REV. 363 (1957); *Developments in the Law — State Court Jurisdiction,* 73 HARV. L. REV. 909 (1960); Note, 49 CORNELL L.Q. 110 (1963); Note, 37 IND. L.J. 333 (1962); Note, 44 IOWA L. REV. 361 (1959); Comment, 17 OKLA. L. REV. 86 (1964); Comment, 38 WASH. L. REV. 560 (1963).

reliance upon *Hanson v. Denckla*[42] to delimit the scope of the "minimal contact" required does need further analysis.

Hanson involved a rather complex factual situation, but the primary question before the Court was whether a Florida judgment affecting the status of a Delaware trust company which had been served with process by publication should be given full faith and credit in Delaware. After carefully examining the transactions relating to the trust held by the Delaware trust company, the Court found as a matter of fact that "The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that state either in person or by mail."[43] Nowhere in the *Clemens* opinion, however, can a factual discussion be found which would support the conclusion that the defendant had had no contact with Colorado. In fact, the affidavit submitted by Clemens in the District Court would indicate that not only had Bowers been in Colorado but also that the automobile was loaned in Colorado.[44]

Perhaps the reason for the absence of a factual discussion of defendant Bowers' contact with Colorado was the court's unstated but implicit understanding of the principle in Colorado that negligence of a permittee will not be imputed to an owner of an automobile, at least when there is no indication of negligence on the part of the owner either through physical presence in the automobile or in the irresponsible loaning of the automobile to the permittee.[45] But the question of liability was not before the court; the issue to be resolved was Bowers' amenability to service of process.[46] Chief Judge Arraj, in a well considered Colorado Federal District Court opinion,[47] discussed the ever expanding concepts of in personam jurisdiction:

> One of the most elementary of legal principles is that a basis of jurisdiction must exist before a court has competence to act. Two

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[42] Hanson v. Denckla, 357 U.S. 235 (1958).

[43] *Id.* at 251. It should be noted that the court's factual finding is preceeded by the quotation from *Hanson* found in and relied upon by the Colorado court in *Clemens*. Additionally the citations relied upon by the Supreme Court as supporting its finding of fact are the very same the Colorado court regarded as being limited by *Hanson; i.e.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); and Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[44] See discussion *supra* note 20.

[45] Graham v. Shilling, 133 Colo. 5, 9, 291 P.2d 396 (1955).

> It is a general rule that negligence in the use of an automobile by one other than the owner cannot be imputed to the owner merely because of his ownership, an automobile not being in itself a dangerous instrumentality.

[46] Clifford, *supra* note 38, at 315.

[47] Elliott v. Cabeen, 224 F. Supp. 50 (D. Colo. 1963).

> tests are applied in determining whether a basis exists. The first is the inquiry whether legislative jurisdiction exists — does the state have power to declare that its courts have jurisdiction over a particular subject matter? The second is whether judicial jurisdiction exists, a determination made on the basis of a twofold test: (1) assuming that legislative jurisdiction exists, has the state exercised it by providing the courts with a method for acquiring jurisdiction? (2) If a method has been so provided, are there sufficient jurisdictional facts to satisfy the requirements of the method provided?[48]

The discussion of Bowers' position in the first holding is difficult to fit within the form prescribed by Chief Judge Arraj. It must be assumed that the court accepted the well-established principle that legislative jurisdiction over nonresident motorists is within the power of the state. But the discussion of judicial jurisdiction is more difficult, since the court in *Clemens* did not clearly differentiate the distinctions between the exercise of legislative jurisdiction and the factual basis for subjecting one to that jurisdiction.

Although legislative intent would seem to controvert the idea that owners not operating an automobile at the time of an accident were excluded from the operation of the act,[49] the court could have supported its ultimate holding that defendant Bowers was not amenable to substituted service of process on this basis. The court, in its initial interpretation of the original act,[50] had said in *Carlson v. District Court,*

> So far as we are advised and can learn, it is universally held that statutes, such as section 48(1), [Colo. Sess. Laws 1937, ch. 92, § 4, p. 324], supra, providing for substituted service, are in derogation of the common law and must be strictly construed and followed before jurisdiction of the person can attach thereunder. . . .[51]

Later Judge Knous, speaking in federal district court and relying upon the language in *Carlson,* held the act inapplicable to persons not personally operating an automobile at the time of an accident.[52] On that occasion he stated:

> Construing their statutes, courts in other jurisdictions generally have held that the words 'while operating' and 'operation by' as is the language of section 48(1), [Colo. Sess. Laws 1937, ch. 92, § 4, p. 324], supra, apply only to nonresident individuals *personally operating* a motor vehicle and do not include a non-resident owner not then present in such state, even though the operation was with his knowledge and consent.[53]

He noted further:

> Decisions in which service on a non-resident owner not person-

[48] *Id.* at 52.

[49] See discussion at note 17 *supra.*

[50] Colo. Sess. Laws. 1937, ch. 92, pp. 323-25.

[51] Carlson v. District Court, 116 Colo. 330, 342, 180 P.2d 525 (1947).

[52] Larsen v. Powell, 117 F. Supp. 239 (D. Colo. 1953).

[53] *Id.* at 240.

> ally operating the motor vehicle or present therein at the time of accident has been upheld seem uniformly attributable to express statutory language so permitting.[54]

Thus, it would have been entirely proper on the basis of existing precedent for the court to have declared the act inapplicable to defendant Bowers. Such a declaration would have involved the recognition that the legislature had not exercised legislative jurisdiction over nonresident owners not physically operating an automobile at the time of an accident. But the court made no such declaration. Consequently, it must be assumed that the court accepted the legislative exercise of jurisdiction over persons in the position of defendant Bowers.

The acceptance by the court of the exercise of legislative jurisdiction over a nonresident owner whose permittee was involved in an accident in Colorado required of the court a discussion of the jurisdictional facts prerequisite to a final determination of the existence of judicial jurisdiction. Although, as subsequent discussion will show, it is the position of this writer that the factual conclusion reached by the court with respect to this final test of judicial jurisdiction could have turned differently, it is unfortunate that the court accepted the exercise of legislative jurisdiction. Since the court was determined *in limine* to conclude that the requisite factual grounds were not present to support judicial jurisdiction,[55] the court was adopting a construction of the act which would require a holding of unconstitutionality. The court, discussing the scope of the statute, stated:

> The language in Chapter 75 providing for substituted service of process is broad enough to warrant resort to such service on a nonresident owner of a motor vehicle involved in an accident in Colorado where the owner has no contacts or ties, minimal or otherwise, with Colorado — the status of Barbara Bowers, defendant in the trial court.[56]

In this light the act is clearly unconstitutional. But to adopt a construction of an act which renders it unconstitutional when, as here, an alternative approach would have rendered it constitutional, is to ignore the well recognized principle "that an act should be upheld as constitutional if possible, and that if one construction would violate both federal and state Constitutions and another interpretation would be consonant therewith, the latter should be adopted. . . ."[57] Furthermore, the holding of the act unconstitutional

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[54] 117 F. Supp. at 241.

[55] See discussion at note 21 *supra.*

[56] 390 P.2d at 85; see also the discussion at note 21 *supra.*

[57] Champlin Ref. Co. v. Cruse, 115 Colo. 329, 334, 173 P.2d 213 (1946).

on this basis was unnecessary to the ultimate decision by the court that the notice provisions of the act were deficient.[58]

Nevertheless, the factual foundation existing in *Clemens* could have supported a finding of judicial jurisdiction over defendant Bowers. The Restatement (Second) of Conflicts of Laws states when a state has judicial jurisdiction:

> A state has judicial jurisdiction over an individual who has done or caused to be done, an act which either took place in the state or resulted in consequences in the state for the purposes of any cause of action arising out of the act within limitations of reasonableness appropriate to the relationship derived from the act.[59]

A comment which follows this section discusses its application to nonresident motorist acts:

> In this country, the rule of this Section is most frequently applied in the case of motor vehicles. Every state provides by statute for the exercise of judicial jurisdiction in certain circumstances over a non-resident motorist as to actions growing out of an accident or collision he may have had in the state. Such a statute may be constitutionally applied if it is in effect when the vehicle is operated within the State, and if it makes provision for giving the nonresident motorists reasonable notice and a reasonable opportunity to be heard.
>
> Where a non-resident owner of a motor vehicle does not himself operate it within the state but causes another to operate it, there is a question of interpretation of the statute as to whether it is applicable. If the statute is interpreted as subjecting the owner of the vehicle to the jurisdiction of the court in such a case, the court acquires jurisdiction over him even though he was not himself at any time within the state.[60]

Under this well-recognized rule[61] defendant Bowers would be subject to the substituted service of process provisions of the act.

Apparently the only case to extensively discuss the rationale of the Restatement rule is *Davis v. St. Paul-Mercury Indem. Co.*[62]

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[58] See the discussion by Clifford, *Colorado's "Short-Arm" Jurisdiction*, 37 U. COLO. L. REV. 309, 310 (1965), wherein it is observed:

> Indeed, unless the court chose to discuss this issue in order to provide guidelines for future legislation — a meritorious, if unusual, motive for a court to decide constitutional questions — its decision would seem a clear departure from the traditional refusal of courts to decide constitutional questions unless indispensible to decision.

[59] RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, p. 89 (Tent. Draft No. 3, 1956).

[60] *Id.* comment f at 94.

[61] See generally authorities cited *supra* note 41 and the Reporters Note, RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, at 96-98 (Tent. Draft No. 3, 1956).

[62] 294 F.2d 641 (4th Cir. 1961). This case has been extensively noted. See *e.g.*, Note 7 VILL. L. REV. 554 (1962); Comment, *Motor Vehicle Area Provides Impetus for Further Expansion of In Personam Jurisdiction*, 23 MO. L. REV. 235 (1963); Comment, 16 RUTGERS L. REV. 446 (1962); 30 GEO. WASH. L. REV. 747 (1962); 37 NOTRE DAME L. REV. 554 (1962); 48 VA. L. REV. 378 (1962); 13 W. RES. L. REV. 396 (1962).

In *Davis,* Judge Sobeloff correctly anticipated the method of analysis suggested by Chief Judge Arraj in *Elliot v. Cabbeen.*[63] Consequently, the decision specifically held (1) that the North Carolina legislature had exercised legislative jurisdiction over a nonresident owner of an automobile driven by a sub-permittee at the time of an accident[64] and (2) that the requisite jurisdictional facts were present so that it was constitutional to apply the act to such an owner.

Although the amicus brief in *Clemens* fully discussed *Davis,* no mention of that case appears in the court's opinion. It would not have been difficult for the court to have distinguished the North Carolina act from that of Colorado's,[65] but the failure to do so is not significant since the *Clemens* decision had already assumed the exercise of legislative jurisdiction. The failure to discuss *Davis* becomes more substantial, however, when it becomes apparent that once legislative jurisdiction had been deemed exercised, the two courts had before them the identical question for resolution; namely whether the jurisdictional facts were present.

Judge Sobeloff in *Davis* began his consideration of this problem by discussing the same cases which were cited by the court in *Clemens* to support its ruling of unconstitutionality. First, he interpreted *International Shoe Co. v. Washington*[66] as establishing the requirement that the exercise of jurisdiction must be reasonable.[67] A method of analysis was deemed conclusive of this requirement:

> Therefore, what is required is an analysis and weighing of the

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[63] 224 F. Supp. 50 (D. Colo. 1963).

[64] The owner in *Davis,* unlike the owner in *Clemens,* had never been in the state, and further, the owner in *Davis* was deemed subject to substituted service of process when the act done consisted of furnishing her son an automobile with permission to loan it to others. The automobile was being driven by a third person at the time of the accident.

[65] The North Carolina Statute, N. C. GEN. STAT. § 1-105 (Supp. 1963) provides:

> The acceptance by a nonresident of the rights and privilege conferred by the laws now or hereafter in force in this state permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this state, or at any other place in this state, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved *by reason of the operation by him, for him, or under his control or direction, express or implied,* of a motor vehicle on such public highways of this state, or at any other place in this state, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator. (Emphasis added.)

[66] 326 U.S. 310 (1945).

[67] 294 F.2d at 646.

> interests of a defendant in not being called upon to defend in the forum, of a plaintiff in being able to acquire jurisdiction over a defendant in the place where the cause of action arose, and of a state in being able to open its courts to the particular lawsuit. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, Comment C (Tent. Draft No. 3, 1956); *Developments in the Law — State Court Jurisdiction,* 73 HARV. L. REV. 909, 924-925 (1960).[68]

Balancing the respective interests of the plaintiff and the defendant, Judge Sobeloff relied upon *McGee v. International Life Ins. Co.*[69] as establishing sound precedent for subjecting the nonresident to suit in the forum where the cause of action arose, where the witnesses reside, and, if possible, in the state whose law is applicable. In *Davis,* these conveniences could be provided the plaintiff without corresponding disadvantages to the defendant.[70]

The strongest argument by the court in *Davis,* however, was with respect to the interest of the state in acquiring jurisdiction over the nonresident owner. *Hanson v. Denckla*[71] was regarded as merely requiring "that the forum state have some interest in being able to open its courts to the action. Unquestionably a state in which an automobile tort was committed has such an interest."[72] This interest was described succinctly and in the language of the Restatement:

> The state has a strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the state's interest; it is not pushing the matter too far to recognize that the state may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the state's highways. (Citation omitted.)
>
> In Hess v. Pawloski . . . jurisdiction was asserted over a nonresident motorist who was also the owner of an automobile. We are asked to go beyond that case and uphold North Carolina's jurisdiction over an automobile owner who had never come into the state. However, the momentary physical presence of the defendant within the state should not be controlling. Far more important are the consequences foreseeable from his authorizing the use of his automobile there.[73]

The language of Judge Sobeloff on this occasion is not unlike

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[68] *Id.* at 647. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 84, Comment at 91-93 (Tent. Draft No. 3, 1956); *Developments in the Law — State-Court Jurisdiction,* 73 HARV. L. REV. 909, 924-925 (1960).

[69] 355 U.S. 220 (1957).

[70] 294 F.2d at 647.

[71] 357 U.S. 235 (1957). See textual discussion at pp. 222-23 *supra* for criticism of the *Clemens* application of *Hanson.*

[72] Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641, 648 (4th Cir. 1961).

[73] *Ibid.*

that used by the Supreme Court on other occasions. In *Young v. Masci*,[74] decided in 1932, it was said with respect to liability:

> A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument.[75]
>
> No good reason is suggested why, where there is permission to take the automobile into a state for use upon its highways, personal liability should not be imposed upon the owner in case of injury inflicted there by the driver's negligence, regardless of the fact that the owner is a citizen and resident of another State. (Citation omitted.)[76]

Additionally, in *McGee v. International Life Ins. Co.*,[77] the Supreme Court discussed the entry of judgment against a nonresident corporation not doing business in the state:

> Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. (Citation omitted.) The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum — thus in effect making the company judgment proof. Often the crucial witnesses — as here on the company's defense of suicide — will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process. (Citations omitted.) There is no contention that respondent did

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[74] Young v. Masci, 289 U.S. 253 (1933). In *Young*, suit was brought against a resident of New Jersey who had loaned his car to a third person in New Jersey. The third person drove the car in New York and was involved in an accident with the plaintiff. New York had a statute which provided:

> Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with permission, express or implied, of said owner. N. Y. Laws 1929, vol. 1, p. 82, cited in Young v. Masci, *supra* at 255-56.

The Supreme Court sustained the validity of the statute as applied to Young. The fact that Young would not have been liable in New Jersey was not deemed to deny him due process.

[75] *Id.* at 258.

[76] 289 U.S. at 260.

[77] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

not have adequate notice of the suit or sufficient time to prepare its defenses and appear.[78]

In both *Young* and *McGee* the Supreme Court was discussing liability and presumably the factual basis upon which liability was imposed would be more stringently scrutinized than if mere amenability to substituted service of process was being considered.[79] In *Clemens* the facts were that defendant Bowers had been in Colorado immediately preceding the accident. She had departed from the state leaving in the possession of defendant Clemens her automobile. Evidently Bowers imposed no restrictions on Clemens' use of the car. Clemens drove the car and through its operation injuries were inflicted upon others.[80] Is it not possible, then, to conclude that the factual basis existed for subjecting defendant Bowers to in personam jurisdiction?

II. THE NOTICE REQUIREMENT

The second holding in *Clemens* — that, "Procedures only fifty percent effective cannot be held as reasonably calculated to bring notice to the defendant or to constitute due process."[81] — is perhaps the better reasoned portion of the *Clemens* opinion. Nevertheless, a discussion of this portion of the opinion is not less difficult than the discussion of the "minimal contact" portion. Several objections to the final decision reached by the court are proper.

The first objection is one which is common to most decisions involving a consideration of nonresident motorist legislation; that

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[78] *Id.* at 223-24. The Colorado Supreme Court considered this case as being limited by *Hanson.* See textual discussion *supra* pp. 222-23. But the Court in *Hanson* specifically distinguished McGee:

> The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum state. In that respect, it differs from McGee v. International Life Ins. Co., 355 U.S. 220 and the cases therein cited. 357 U.S. at 251.

[79] See discussion p. 223 *supra.* In the Brief of Amicus Curiae, Clemens v. District Court, 390 P.2d 83 (Colo. 1964), Tanksly v. Dodge, 181 F.2d 925 (5th Cir. 1960), is relied upon to support the proposition that jurisdictional questions should be considered independently of the question of liability.

> Determination of questions of possible ultimate liability to respond in damages is not now necessary. The statute here involved does not purport to deal with the question of ultimate liability. Its purpose is to subject to the jurisdiction of the Mississippi courts nonresidents concerned in the operation of automobiles within the State within the terms of the statute, so that its citizens may assent as against such persons their claims in local courts so that thereby the question of actual liability may be determined. . . . Upon consideration of a motion to quash service of summons in such an instance the question is whether the allegations of the complaint and the facts of the case as disclosed show that the defendant brought before the Court is such a defendant as is subjected by the statute to *substituted service of process.* If so, questions of actual liability are required to be determined by other and further proceedings. (Emphasis in original.) Tanksly v. Dodge, *supra* at 927-28.

[80] See note 21 *supra.*

[81] 390 P.2d at 90. See also textual discussion at pp. 220-22 *supra.*

is, courts tend to rely upon decisions interpreting statutes different from their own. All fifty states presently have some form of legislation designed to secure jurisdiction over nonresident motorists,[82] and in virtually every state the legislation is significantly different in some detail. These differences in legislation have resulted, as could be expected, in different constructions by courts even when essentially identical questions were under consideration. Nowhere

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[82] Statutes: only the first section is cited unless changed subsequent to latest compilation.
ALA. CODE tit. 7, § 199 (Supp. 1963).
ALASKA REV. STAT. tit. 9, § 09.05.020 (Supp. 1964).
ARIZ. REV. STAT. ANN. § 28-502 (1956).
ARK. STAT. ANN. § 27-342.1 (Supp. 1963).
CAL. VEHICLE CODE § 17450 (1960).
COLO. REV. STAT. § 13-8-1 (1963), declared unconstitutional in Clemens v. District Court, 390 P.2d 83 (Colo. 1964).
CONN. GEN. STAT. § 52 (Supp. 1964).
DEL. CODE ANN. tit. 10 § 3112 (Supp. 1962).
D. C. CODE § 40-423 (1961).
FLA. STAT. § 47.29 (Supp. 1964).
GA. CODE ANN. § 68-801 (1957); § 68-802 (Supp. 1963).
REV. LAWS OF HAWAII § 230-33 (Supp. 1963).
IDAHO CODE § 49-1602 (1957).
ILL. REV. STAT. ch. 95½, § 9-301 (1963 Bar Edition).
IND. STATE ANN. § 47-1043 (Supp. 1964).
IOWA CODE § 321.498 (Supp. 1964).
KAN. GEN. STAT. ANN. § 8-401 (Supp. 1961). § 8-402 Sess. Laws of Kan. ch. 55 (1963).
KY. REV. STAT. § 188.010 (1960).
LA. REV. STAT. § 13-3474 (Supp. 1963).
ME. REV. STAT. ANN. ch. 22, § 70 (Supp. 1963).
MD. CODE ANN. art. 66½, § 115 (1957); art. 66½, § 115 (2) (Supp. 1964).
MASS. ANN. LAWS ch. 90, § 3A (1958).
MICH. STAT. ANN. § 9.2103 (1960).
MINN. STAT. ANN. § 170.55 (1960).
MISS. CODE ANN. § 9352-61 (Supp. 1962).
MO. ANN. STAT. § 506.210 (Supp. 1964).
MONT. REV. CODE § 53-202 (1961); § 53-204 superseded by Rule 40 (b) (1964).
NEB. REV. STAT. § 14.070 (Supp. 1963).
NEV. REV. STAT. § 14.070 (Supp. 1963).
N. H. REV. STAT. ANN. § 264.1 (1955).
N. J. STAT. ANN. § 39:7-2.1 (1961); § 39:7-2.1 (Supp. 1964).
N. M. STAT. ANN. § 64-24-3,4 (1960).
NEW YORK MCKINNEY VEHICLE AND TRAFFIC LAW § 253 (Supp. 1964).
N. C. GEN. STAT. § 1-105 (Supp. 1963).
N. D. CEN. CODE ANN. § 39-01-11 (1960).
OHIO REV. CODE ANN. § 2703.20 (Supp. 1964).
OKLA. STAT. ANN. § 391 (1962).
ORE. REV. STAT. § 15.190 (1963).
PA. STAT. ANN. tit. 75 § 2001 (1960).
R. I. GEN. LAWS ANN. § 31-7-6 (Supp. 1964).
S. C. CODE § 46-104 (1962).
S. D. CODE § 33.0809 (Supp. 1960).
TENN. CODE ANN. §§ 20-224 et seq. (Supp. 1964).
TEX. CIVIL STAT. § 2039a (Vernon's 1964).
UTAH CODE ANN. § 41-12-8 (1960).
VT. STAT. tit. 12 § 891 (1958).
VA. CODE ANN. § 8-67.1 (1957).
REV. CODE WASH. ANN. § 46.64.040 (1962).
W. VA. CODE ANN. § 5555 (1) (1961).
WIS. STAT. ANN. § 345.09 (Supp. 1965).
WYO. STAT ANN. § 1-52 (Supp. 1963).

is this fact more evident than in two cases cited by the court in *Clemens*—*Grote v. Rogers*[83] and *Kurrilla v. Roth.*[84]

In *Grote* the Maryland Court of Appeals was asked to invalidate a statute which conclusively presumed an address which had been given by a defendant at the time of an accident, or which appeared of record in the files of the department of vehicle registration in his state of residence, to be the defendant's address in fact at the time of substituted service by registered mail.[85] This conclusive presumption was one basis for the court's rejection of the statute, as is apparent from the following excerpt from the *Grote* opinion:

> The direction as to notice in the Maryland act is that it shall be sent to the defendant at his address as specified in the process. The address so specified is not required to be the true address of the defendant at that time, *or even his last known address,* but it is to be conclusively regarded as correct for the purposes of the suit if it is an address which the defendant gave in any proceeding before any court, magistrate, or justice of the peace, or to any police officer or deputy or other person at the time of accident or at a subsequent period, or if it is his latest address appearing on the records of the commissioner of motor vehicles or other offices charged with the administration of the motor vehicle laws of the state in which any such vehicle is registered in the defendant's name. (Emphasis supplied.)[86]

This portion of the court's opinion immediately precedes that portion of the opinion which was quoted at length by the court in *Clemens.* It continues:

> The sources of information to which the plaintiff is thus referred by the statute may not appraise him of the defendant's correct address at the time when the notice is to be mailed. In the period, which may be prolonged, between the accident and the institution of the suit, a legitimate change of the prospective defendant's domicile may render his earlier declarations as to his residence obsolete.[87]

Thus, it is apparent that the conclusion reached in *Grote* was founded upon a statutory defect which did not exist in *Clemens.* Furthermore, it may have been that the court in *Grote* would have reached a different conclusion had the statute provided that notice be sent to the defendant's "last known address" as did the Colorado act.[88]

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[83] Grote v. Rogers, 158 Md. 685, 149 Atl. 547 (1930).

[84] Kurrilla v. Roth, 132 N.J.L. 213, 38 A.2d 862 (1944).

[85] MD. ACTS ch. 254 (1929), quoted note 32 *supra.*

[86] Grote v. Rogers, 158 Md. 685, 149 Atl. 547 at 551 (1930).

[87] *Ibid.* Also cited in Clemens v. District Court, 390 P.2d 83, 89 (Colo. 1964).

[88] COLO. REV. STAT. § 13-8-4 (1963) *supra* note 4.

It is also apparent from the entire *Grote* opinion, that the court considered the actual receipt of notice by the defendant necessary to comport with the requirements of due process.[89] That the Colorado court read the *Grote* opinion in this manner, also, is supported by the quote from *Kurrilla*[90] immediately following the *Grote* citation.[91]

In *Kurrilla,* the New Jersey Supreme Court was asked to determine whether substituted service of process upon a soldier on active duty, served by leaving a copy of summons and complaint at the home of the soldier's mother and stepfather, was within the statutory provisions for such service at a person's "usual place of abode."[92] After construing " 'usual place of abode,' [as] the place where one is 'actually living' at the time when service is made,"[93] the court deemed the return of service to be false, and ruled that the service must be set aside.[94]

In reaching its decision, the New Jersey Court considered the due process requirements of notice.

> The general rule in regard to the service of process, established by centuries of precedent, is that process must be served personally, within the jurisdiction of the court, upon the person to be affected thereby. Substituted or constructive service, when provided by statute, is in derogation of the general rule, and so the statutory directions must be strictly construed and fully carried out to confer jurisdiction. (Citations omitted.) The construction and application of R.S. 2:27-59, N.J.S.A., *supra,* must comport with the fundamentals of due process. The design of provisions for such substituted service is to afford the defendant actual notice of the action in time to make defense, if he so chooses, and thus to serve the essential purpose of personal service. The principle of reasonable notice is of the essence. The object of all process is to impart to the person affected notice of the proceeding and an opportunity to defend; and the sufficiency of the statutory substitute for personal service depends upon whether it is reasonably calculated to provide the defendant with notice of the action or proceeding and an opportunity to be heard. (Citations omitted.)[95]

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[89] See discussion by Clifford *supra* note 38, at 326-27.

[90] Kurrilla v. Roth, 132 N.J.L. 213, 38 A.2d 862 (1944).

[91] 390 P.2d at 90.

[92] N. J. STAT. ANN. § 2:27-59 (1937).

[93] Kurrilla v. Roth, 132 N.J.L. 213, 38 A.2d 862, 864 (1944).

[94] *Id.* at 865.

[95] *Id.* at 865.

[96] Blackmer v. United States, 284 U.S. 421 (1932). In *Blackmer,* the designation by Congress of consuls to serve subpoenas upon citizens of the United States was found not to violate due process. In dictum the court states "The efficacy of an attempt to provide constructive service in this country would rest upon the presumption that the notice would be given in a manner calculated to reach the witness abroad." Blackmer v. United States, *supra* at 439.

To support its statement of the law relating to notice, the court relied upon three decisions by the Supreme Court: *Blackman v. United States,*[96] *Washington ex rel. Bond & Goodwin & Tucker v. Superior Court,*[97] and *McDonald v. McBee.* Of these decisions, only *McDonald* appears relevant to the discussion, and the criterion laid down by Justice Holmes there has since been superseded by *Wuchter.*[99] The most serious objection to the use of *Kurrilla* to support the reasoning in *Clemens,* however, is that the conclusion reached therein is inimical to the ultimate holding of unconstitutionality in *Clemens.* Although the discussion of the requirement of notice in *Kurrilla* was not necessary to support the decision to set aside service of process — service being valid only at one's actual place of abode[100] — , nevertheless, the same reasoning applied to the Colorado Act[101] would have led to a holding of constitutionality. The New Jersey statute was deemed constitutional and not at variance

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[97] Washington *ex rel* Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361 (1933). The court determined that a state statute providing for substituted service on a corporation which had previously done business in the state and which had since removed without leaving an agent upon whom service could be served, was not in violation of due process even though no provision for securing notice to the corporation was provided in the statute. The Court stated:

> The power of the State altogether to exclude the corporation, and the consequent ability to condition its entrance into the State, distinguishes this case from those involving substituted service upon individuals . . . whose entrance into a State may render them amenable to action there, only if the statute providing for substituted service incorporates reasonable provision for giving the defendant notice of the initiation of litigation, Hess v. Pawlaski, 274 U.S. 352. Washington *ex rel* Bond & Goodwin & Tucker v. Superior Court, *supra* at 365-66.

At no point, however, did the Court deem actual notice a prerequisite to valid substituted service of process.

[98] McDonald v. Mabee, 243 U.S. 90 (1917). Justice Holmes declared invalid a judgement on a personal note where service on the defendant was effected by publication subsequent to the time when the defendant had removed from Texas and established domicile in Missouri.

[99] Although some of the language in both *Hess* and *Wuchter* could be construed to support a conclusion that actual notice is required, modern authorities simply do not support such a conclusion. Reading the cases in context, the most that can be divined is that a statute ". . . must, in order to be valid, contain a provision making it reasonably probable that notice . . . will be communicated to the nonresident defendant who is sued." Wuchter v. Pizzutti, 276 U.S. 13, 18 (1928).

The generally accepted modern statement of the standard to be applied to notice is found in RESTATEMENT (SECOND), CONFLICT OF LAWS § 75, Comment e, p. 94 (Tent. Draft No. 3, 1956):

> It is not necessary that the defendant should have received actual knowledge of the action in which the judgment was rendered. It is sufficient that the steps taken to give him notice of the action and an opportunity to be heard satisfy the requirements of the rule of this Section.

For jurisdictions not following the RESTATEMENT rule see Gibbons, *A Survey of the Modern Nonresident Motorists Statutes,* 13 U. FLA. L. REV. 257, 267 (1960) and Jox, *Non-Resident Motorists Service of Process Acts: Notice Requirements — A Plea for Realism,* 33 F.R.D. 151, 178 (1963).

[100] See textual discussion, pp. 232-33 *supra.*

[101] COLO. REV. STAT. § 13-8-4 (1963), *supra* note 4.

with the requirement of actual notice, because service would be valid only if served at one's actual place of abode. Similarly, since the Colorado Act provided for service of process sent by registered mail to one's "last known address,"[102] this address, under the *Kurrilla* rationale, would be one's actual address; and notice would be actual notice.

Disregarding the inapplicability or imprecise application of the *Grote* and *Kurrilla* cases by the court, however, the question of whether or not the provisions for notice contained in the Colorado Nonresident Motorist Act meet the requirement of due process still remains. The Act, in pertinent part, provides:

> . . . the court shall . . . enter an order ex parte setting forth the *last known address* of the defendant and authoribing service to be made on the secretary of state. Service shall be made by delivering two copies of the process, complaint, motion and order of court to the secretary of state, his deputy or assistant. . . . *Notice* of such service and a copy of each instrument so served *shall forthwith be sent by the secretary of state by certified or registered mail, addressed to the defendant at his address given in the order of court, with return receipt requested.* Promptly after such mailing the secretary of state shall file with the clerk of the court a certificate showing such mailing. *Service shall be complete thirty days after service of process on the secretary of state as provided in this section.* (Emphasis supplied.)[103]

It is clear from the portion just quoted that the act must be classified with those from other states which provide that notice be sent to the defendant's "last known address." It is clear from the *Clemens* opinion that the court did not consider this aspect of the Colorado Act. The court did consider, however, that the service provisions did not provide for filing the return receipt, and that service on the secretary of state was deemed complete regardless of whether or not the receipt was returned or whether or not notice had been imparted.[104]

Although the court throughout the second portion of the opinion professed belief in the principle that the notice required need not be actual,[105] the conclusion reached was that anything

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[102] *Ibid.*

[103] *Ibid.*

[104] 390 P.2d at 90.

> Though Chapter 75 requires that the papers be sent by certified or registered mail, "with return receipt requested," it makes no provision as to the disposition to be made by the secretary of state of the "return receipt." The statute provides that the secretary of state shall "promptly" after such mailing certify as to the fact of mailing. It necessarily follows that if the secretary of state "promptly" makes his certificate of service, he will have done so before he could receive any "return receipt" as requested.

[105] Clifford, *Colorado's "Short-Arm Jurisdiction,"* 37 U. COLO. L. REV. 309 (1965).

short of actual notice would be deficient.[106] Having reached this conclusion, it is unfortunate that the court failed to consider the implications of the last "known address" aspect of the act. As noted in the discussion of *Kurrilla*,[107] which is typical of cases construing "last known address" acts, the orthodox approach would be to require that the address to which notice was sent to be the actual address in fact.[108] Applying this rationale it would be possible to uphold the constitutionality of the act while refusing to allow service on a particular defendant who did not receive actual notice of the suit.

While notice of suit actually acquired, but without the terms of a statute providing for substituted service, cannot give validity to a statute which is constitutionally deficient,[109] it should be noted that Clemens had actually obtained notice of the suit and promptly moved to "quash" service. At least one case,[110] involving a statute not unlike that in *Clemens*,[111] considered the filing of such a motion as evidence that service of process had been in fact received. The Supreme Court of Appeals of Virginia stated therein:

> A letter properly addressed, stamped and mailed is presumed to have reached the addressee, although this presumption is not conclusive, but is founded upon the probability that the Postal Department will properly discharge its duties. . . . This presumption is strengthened where the letter was registered, indeed, it is not contended here that there was no actual delivery. Defendants rest their case alone upon the fact that this return receipt has not been filed, a requirement, as we have seen, not written into our statute. Not only does it contain reasonable provisions for probable communications, but the conduct of the parties indicates communication

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[106] See textual discussion, pp. 232-33 *supra*. The court stated at page 90:

> We are not unmindful of the fact that courts of last resort of many states have held that procedures such as those had here and statutes bearing marked similarity to Chapter 75 are valid and not lacking in due process. Our reasoning and analysis of the problems presented lead us to contrary conclusions.
>
> Here, proceeding under the statute, service was had on two defendants; one received notice, the other did not. Though the effectiveness of procedures prescribed should not be finally adjudged on results attained in an isolated case, the result here attained does cast grave doubt on the effectiveness of the methods provided and pursued.

[107] Kurrilla v. Roth, 132 N.J.L. 213, 38 A.2d 862 (1964), and textual discussion pp. 234-35 *supra*.

[108] Gibbons, *A Survey of the Modern Nonresident Motorist Statutes*, 13 U. FLA. L. REV. 257, 266-69 (1960).

[109] Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928).

[110] Carroll v. Hutchinson, 172 Va. 43, 200 S.E. 644 (1939).

[111] CODE OF VIRGINIA § 8-67.2 (1957).

> . . . [s]uch service shall be sufficient upon the said nonresident, provided, that notice of such service and a copy of the process or notice are forthwith sent by registered mail, with registered delivery receipt requested. . . .

> was actually had. Counsel promptly appeared, and while their special appearance did not waive the claim that this return receipt should have been filed, it did indicate reasonable probability that process had been received, not through random chance, as was true in Wuchter v. Pizzutti . . . but because there had been compliance with an adequate statute.[112]

While it is true that Clemens did not receive the registered letter addressed to him — the court stated, "The record does not shed any light on what may have become of the letter directed to Clemens."[113] — the reasoning in the Virginia decision with respect to the filing of a return receipt appears valid.[114] Furthermore, it would not seem unjust to place upon a prospective defendant the burden of making his latest address available to one who may have a valid claim to assert.[115] Certainly, a liberal construction based upon the statutory provision for extensions and continuence[116] could afford adequate safeguards for one who had, as did Clemens, notice of the suit.

Earlier some attempt was made to determine legislative intent with regard to those persons over whom the legislature had sought to exercise jurisdiction.[117] The same question now arises with regard to the changes which the 1961 Act made in the provisions relating to service of process.[118] There would seem to be no doubt that the intent was to broaden the scope of the act.[119] Nevertheless, investigation by this writer has failed to disclose the purpose behind the

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[112] Carroll v. Hutchinson, 172 Va. 43, 200 S.E. 644, 647 (1939).

[113] 390 P.2d at 90.

[114] In Speer v. Robert C. Herd & Co., 189 F. Supp. 432 (D. Md. 1960), the court stated:

> Securing a return receipt and filing it with the court clerk is not a prerequisite [to due process]; it is only one of the possible provisions which may be adopted. No case making it a prerequisite has been cited or found. 189 F. Supp. 434.

For further discussion see Comment, 42 DEN. L.C.J. 156-60 (1965).

[115] See generally, Jox, *Non-Resident Motorist Service of Process Acts: Notice Requirements — A Plea for Realism,* 33 F.R.D. 151 (1963).

[116] COLO. REV. STAT. § 13-8-5 (1963).

[117] See discussion note 17 *supra.*

[118] Colo. Sess. Laws 1937, § 3, at 324.

> Service of such process shall be made by leaving a copy of the process . . . with the secretary of state, or in his office, and such service shall be sufficient service upon such nonresident defendant . . . provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt or, in the event the defendant refuses to accept such registered mail, the registered mail with his refusal thereon and the plaintiff's affidavit of compliance herewith are filed with the papers in the case on or before the return day of the process, or within such further time as the court may allow . . . .

[119] See generally, Clifford, *supra* note 105 at 323-26.

changes effected.[120] It would not seem to be illogical, in view of the similarity between the Virginia Act[121] and the 1961 Act, to conclude that a similar design was desired by the 1961 General Assembly; this design would be particularly true in view of the interpretation placed upon the Virginia Act.

Stephen G. Heady

INSURANCE — OMNIBUS CLAUSE — PERMISSIVE USE IS THE PROPER TEST OF COVERAGE UNDER PUBLIC AUTOMOBILE LIABILITY INSURANCE POLICIES AND MINOR DEVIATION RULE APPLIED IN DETERMINING WHETHER A DEVIATION FROM THE PERMITTED USE PRECLUDES COVERAGE UNDER THE OMNIBUS CLAUSE.
American Bus Lines, Inc. v. American Surety Co. 238 F. Supp. 589 (D. Colo. 1965).

A State Highway Department employee was directed to take a truck from Berthoud Pass to Denver for the purpose of having the truck's radio repaired and then to return to Berthoud Pass. Upon arriving in Denver, the employee first visited his parent's home and then reported to the highway shops. The radio work was completed shortly before noon, but instead of returning to his work station in Berthoud Pass, he visited a friend's home where he drank a few bottles of beer.

About four o'clock p.m. he left his friend's home and started on his return trip to Berthoud Pass. While traveling the very highway which would have returned him to his work station, his truck collided with a bus owned by the American Bus Lines, Inc. The state employee was killed and the administrator of his estate brought this action for a declaratory judgment as to the coverage under a

[120] It is known that the legislation was proposed by the Colorado Bar Association but since no legislative history is available in Colorado, it is impossible to go further. See Menard, *Legislation and the Colorado Supreme Court — Techniques of Statutory Construction*, 26 ROCKY MT. L. REV. 425, 433-35 (1954).

[121] See textual discussion, pp. 236-37 *supra.*

[122] 390 P.2d at 91.

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[1] Schultz v. Krosch, 204 Minn. 585, 284 N.W. 782 (1939): In defining the purpose of the "omnibus clause," the court held, "the effect of the omnibus clause was to extend the insurance coverage to any person while using the automobile with the consent of the named insured." See generally 7 APPLEMAN, INSURANCE LAW AND PRACTICE, §§ 4366-4368 (1962); 12 COUCH, INSURANCE, §§ 45: 463-45-468 (2d ed. 1964); Austin, *Permissive Use Under The Omnibus Clause of The Automobile Liability Policy*, 29 INS. COUNSEL J. 49 (1962); Dimond, *The New Standard Automobile Policy*, 23 INS. COUNSEL J. 67 (1956); Annot., 5 A.L.R.2d 604 (1949).

liability policy containing an omnibus clause[1] issued by the defendant to the State.

The Colorado Federal District Court, Doyle, J., held that the proper test of liability coverage for an employee is "permissive use" rather than "scope of employment" and that the employee's use of the highway department vehicle, at the time of the accident, was with the state's permission and hence he was covered by the policy.[2]

The defendant argued that "scope of employment"[3] should be the proper test of liability coverage rather than "permissive use"[4] because the statute[5] authorizing the purchase of the insurance allowed the state purchasing agent to obtain insurance for the purpose of insuring officers, employees, and agents against liability "for injuries or damages resulting from their negligence or other tortious conduct during the course of their service of employment."

The court listed the following reasons for rejecting this contention: (1) the statute is an authorization statute and was not designed to limit the scope of coverage; (2) the defense of *ultra vires* belongs to the State of Colorado and not to the defendant insurance company; (3) the insurance company is estopped from denying coverage because the contract was presumably written by it with full knowledge of the law, a consensual act on its part; and (4) the Colorado Safety Responsibility Act[6] requires that a permission clause be included in all liability policies.

Although the first three reasons offered by the court are not

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[2] American Bus Lines, Inc. v. American Surety Co. of New York, 238 F. Supp. 589 (D. Colo. 1965).

[3] Gray v. Sawatzki, 291 Mich. 491, 289 N.W. 227 (1939): In this master and servant case, the court held that when the employee is outside the scope of employment, he is outside the employer's consent.

[4] Messer v. American Mut. Liab. Ins. Co., 193 Tenn. 19, 241 S.W.2d 856 (1951): The court in this case employed the "permissive use" test and held that coverage would be allowed where the use of the vehicle, at the time of the accident, was with the permission of the named insured.

[5] COLO. REV. STAT. § 72-16-2 (1963) provides:

> The head of a department of the State of Colorado, with the approval of the governor, or in the case of the county or city and county, the chief executive officer or county commissioner, and subject to appropriations being available therefor, is hereby authorized to procure insurance, through the state purchasing agent as provided in chapter 3, article 4, C.R.S. 1963, for the purpose of insuring its officers, employees, and agents against any liability, other than a liability which may be insured against under the provisions of "The workmen's compensation act of Colorado," for injuries or damages resulting from their negligence or other tortious conduct during the course of their service or employment. Counties or cities and counties are hereby authorized to insure their officers, employees, and agents against similar liabilities.

[6] COLO. REV. STAT. § 13-7-22 (c) (1963) provides:

> Said policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said insured.

without support,[7] the most persuasive is the fourth. It is generally recognized that the purpose of such a statute is to guard against the defense that the insured was not operating the vehicle personally or through an agent, although it was being operated by another with his express or implied consent.[8] Such statutes have received liberal constructions.[9]

In the present case the employee was given initial permission to use the insured state vehicle. To obtain coverage under the "omnibus clause," the deceased employee's administrator had to show that the employee's use of the vehicle, at the time of the accident, was with the permission of the State of Colorado. The defendant insurance company contended that this requirement could not be satisfied because the employee had placed himself outside of the "scope of permission" — the permission granted to the employee did not include the right to make personal trips nor the right to use intoxicants and, furthermore, the State Highway Department Regulations prohibited the use of state vehicles for pleasure and the use of intoxicants while driving a state vehicle.

In resolving the question presented by this case — whether a deviation in time, purpose, or geographical limits from the permitted use precludes coverage under the "omnibus clause" — the courts have adopted three different rules.[10] Some courts have used the "Liberal Rule"[11] which holds that once permission is given, it will extend to any and all uses of the car, regardless of how grossly

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[7] See statute cited note 5 *supra* as supporting the court's first reason. COLO. REV. STAT. § 31-2-5 (1963) provides support for the court's second reason:

> (1) (a) No act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity or power to do such act . . . , but such lack of capacity or power may be asserted: . . . (d) In a proceeding by the attorney general as provided in this code, to dissolve the corporation, or in a proceeding by the attorney general to enjoin the corporation from the transaction of unauthorized business.

Davis v. National Cas. Co., 115 Minn. 125, 131 N.W. 1013 (1911) and Knott v. Security Mut. Life Ins. Co., 161 Mo. App. 579, 144 S.W. 178 (1912) provide support for the court's third reason.

[8] Skenandoa Rayon Corp. v. Halifax Fire Ins. Co., 281 N.Y.S. 193, 245 App. Div. 279, *aff'd*, 272 N.Y. 457, 3 N.E.2d 867 (1936); Sears v. Maryland Cas. Co., 220 N.C. 9, 16 S.E.2d 419 (1941).

[9] Chatfield v. Farm Bureau Mut. Auto. Ins. Co., 208 F.2d 250 (4th Cir. 1954); Indiana Lumbermens Mut. Ins. Co. v. Janes, 230 F.2d 500 (5th Cir. 1956).

[10] Lloyds America v. Tinkelpaugh, 184 Okla. 413, 88 P.2d 356, 357 (1939): In discussing the three rules, the court stated:

> There are three lines of authorities on this question under the usual omnibus clause, (1) those holding any deviation, no matter how slight, will defeat liability; (2) those holding that once permission is given, it will extend to any and all uses of the car; and (3) those holding that slight deviation does not violate the omnibus clause.

[11] Hartford Acc. & Indem. Co. v. Collins, 96 F.2d 83 (5th Cir. 1938); Karton v. New Amsterdam Cas. Co., 280 Ill. App. 201 (1935); Thomas v. Peerless Ins. Co., 121 So. 2d 593 (La. App. 1960); Foley v. Tennessee Odin Ins. Co., 193 Tenn. 206, 245 S.W.2d 202 (1951); Maurer v. Fesing, 233 Wis. 565, 290 N.W. 191 (1940).

the terms of the original permission may have been violated. Others have adhered to the "Conversion Rule," sometimes called the "Strict Rule,"[12] which holds the use to be nonpermissive where it exceeds the "scope of permission" given to such an extent as would render a bailee liable in an action for conversion. A third group has adopted the "Minor Deviation Rule."[13] Under this rule, if the use is not a gross violation of the permitted use, even though it may have amounted to a deviation, the permitee is still afforded coverage.

In the present case, the employee's personal trips constituted deviations in time, purpose, and geographical limits from the permitted use. Since it is the use at the time of the accident that governs coverage under the "omnibus clause,"[14] the deviations in purpose and geographical limits are insignificant because the employee was returning to his work station on a direct route at the time of the accident.

The court held that the employee's use of intoxicants did not void permission nor the coverage because such a use would not place an employee outside the "scope of employment,"[15] a fortiori, it would not place him beyond permission. There is also some direct authority that drinking on the job in violation of an employer's rule does not terminate permission.[16]

The last deviation to be considered, the time deviation, presented the most difficult problem in this case. At the time of the accident there was approximately a four hour time deviation. The court, while not *expressly* adopting any of the three rules previously mentioned, held that this deviation did not operate to remove the employee from the "scope of permission."

Before determining what rule the court, by implication, adopted in the present case, attention should be directed to the fact that

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[12] Standard Acc. Ins. Co. v. Rivet, 89 F.2d 74 (5th Cir. 1937); Hodges v. Ocean Acc. & Guar. Corp., 66 Ga. App. 431, 18 S.E.2d 28 (1941); Hinchey v. National Sur. Co., 99 N.H. 373, 111 A.2d 827 (1955); Indemnity Ins. Co. of No. America v. Lahman, 169 Okla. 380, 36 P.2d 274 (1934); Foote v. Grant, 56 Wash. 2d 630, 354 P.2d 893 (1960).

[13] Maryland Cas. Co. v. Williams, 184 F.2d 983 (5th Cir. 1950); Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 Atl. 866 (1924); Peterson v. Maloney, 181 Minn. 437, 232 N.W. 790 (1930); Costanzo v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., 30 N.J. 262, 152 A.2d 589 (1959); Matits v. Nationwide Mut. Ins. Co., 59 N.J. Super. 373, 157 A.2d 853 (1960); Lloyds America v. Tinkelpaugh, 184 Okla. 413, 88 P.2d 356 (1939).

[14] Maryland Cas. Co. v. Marshbank, 226 F.2d 637 (3d Cir. 1955); Johnson v. American Auto. Ins. Co., 131 Me. 288, 161 Atl. 496 (1932); Johnston v. New Amsterdam Cas. Co., 200 N.C. 763, 158 S.E. 473 (1931); Messer v. American Mut. Liab. Ins. Co., 193 Tenn. 19, 241 S.W.2d 856 (1951); Hartford Acc. & Indem. Co. v. Peach, 193 Va. 260, 68 S.E.2d 520 (1952).

[15] Electric Mut. Liab. Ins. Co. v. Industrial Comm'n, 391 P.2d 677 (Colo. 1964).

[16] New York Cas. Co. v. Lewellen, 184 F.2d 891 (8th Cir. 1950); *cf.* Zurich Gen. Acc. & Liab. Ins. Co. v. Thompson, 449 F.2d 860 (9th Cir. 1931).

these attempts at classification are of necessity inexact and can be used only as a guide to the question involved.[17] The three rules frequently overlap and it cannot always be determined into which category the decisions of a given jurisdiction fall.[18]

It seems clear that the "Liberal Rule" was not adopted by the court in this case. Although under that rule the result would have been the same, no mention of the rule was made by the court and considerable attention was devoted to the character of the use of the vehicle after the court took notice of the fact that initial permission had been given.

Under a stringent application of the "Conversion Rule," it seems that the court could have denied the plaintiff recovery.[19] The decision in favor of coverage and the noticeable omission of any discussion of the rule leaves the impression that it was not adopted by the court.

The last rule to be considered, the "Minor Deviation Rule," appears to be the rule that the court adopted. While the court did not mention the "Liberal" or the "Conversion" rule, it did discuss the "Minor Deviation Rule" in somewhat favorable terms and the result in this case is in accord with that rule — there was a deviation from the permitted use; the deviation was found to be insignificant; and the permittee was held to be within the "scope of permission."

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[17] Gulla v. Reynolds, 82 Ohio App. 243, 81 N.E.2d 406, 408 (1948): "The judicial struggling to formulate a rule may be accounted for by reason of this being a factual question and the cases show an infinite variety of circumstances."

[18] See Harper v. Hartford Acc. & Indem. Co., 14 Wis. 2d 500, 111 N.W.2d 480 (1961).

[19] See Bekaert v. State Farm Mut. Auto. Ins. Co., 230 F.2d 127 (8th Cir. 1956): Ten and one-half hour time deviation barred recovery. Engstrom v. Auburn Auto. Sales Corp., 11 Cal. 2d 64, 77 P.2d 1059 (1938): Permitee granted permission to use car for two hours; accident occurred twenty-three hours later. The court held that the use was nonpermissive. Di Rebaylio v. Herndon, 6 Cal. App. 2d 567, 44 P.2d 581 (1935): Time deviation of approximately twenty-four hours held to preclude coverage. Hodges v. Ocean Acc. & Guar. Corp., 66 Ga. App. 431, 18 S.E.2d 28 (1941): Employee permitted to drive to and from work but instructed not to drive at night or on Sundays. The accident occurred one Sunday afternoon. It was held not covered. Ranthum v. Ferguson, 202 Minn. 209, 277 N.W. 547 (1938): The court denied recovery because of a purpose and two and one-half hour time deviation. Speidel v. Kellum, 340 S.W.2d 200 (Mo. App. 1960); Detour of two and one-half miles was a material deviation and resulted in denial of coverage. Sauriolle v. O'Gorman, 86 N.H. 39, 163 Atl. 717 (1932): Master held not liable when servant deviated one-half mile for his own purpose. Cypert v. Roberts, 169 Wash. 33, 13 P.2d 55 (1932): Employee given permission to use car for one-half hour to do some shopping. Four hours after receiving possession of car, while driving her mother from a park to her home, the employee was involved in an accident. The court held that she was not covered under the "omnibus clause." Collins v. New York Cas. Co., 140 W. Va. 1, 82 S.E.2d 288 (1954): In adopting the "minor deviation rule," the court held that the permittee's use was nonpermissive when he was responsible for a purpose deviation and a four and one-half hour time deviation. Boehringer v. Continental Cas. Co., 7 Wis. 2d 201, 96 N.W.2d 353 (1959): Employee was given permission to drive truck on route between employer's plant and a paper mill approximately six-hundred feet away. He used truck to go home to pick up his lunch and on the way back, when he was eight or nine blocks from the company, he had an accident. The court held his use of the truck was nonpermissive.

The court's decision, in adopting the "Minor Deviation Rule," is sound; although this rule is criticized for being subject to uncertainty, it avoids the harsh results of the "Conversion Rule" and the abuses of the "Liberal Rule," and it is more in accord with the intentions of the parties. The propriety of the court's decision in holding the deviation in the present case to be minor is supported by the authorities.[20] Most of the cases holding a time deviation to be nonpermissive involve much longer periods of time, or else they have the support of additional deviations in purpose and geographical limits.[21]

The significance of this case lies in the fact that it is a case of first impression in Colorado on the question of deviation from permissive use; that is, deviation in time, purpose, or geographical limits as distinguished from the question involved where the permittee delegates the use of the vehicle to a third person.[22] Whether the Colorado state courts will follow this case remains to be seen. For the present, however, the "Minor Deviation Rule" appears to be in effect in the Colorado Federal District Court, and that court has definitely adopted the "permissive use" test rather than the "scope of employment" test to determine coverage under public automobile liability insurance policies.

Lester D. Bailey

PROBATE — JURISDICTION — DISINTERMENT — THE DISTRICT COURT HAS STATEWIDE JURISDICTION IN PROBATE MATTERS TO ALLOW DISINTERMENT IN A PROPER CASE. *Beere v. Miller,* 403 P.2d 862 (Colo. 1965).

A husband and wife were killed in an automobile accident. The wife's will, containing a clause leaving Texas property held in joint tenancy with her husband to her husband, if he survived her, was filed for probate. The sons and only heirs of the husband filed a petition in the probate court for an order to exhume the body of their stepmother along with an affidavit from a pathologist indicating that an autopsy could determine how long each survived after the accident. The trial court dismissed the petition. The sons sought relief in the nature of mandamus to compel the district court to exercise its proper jurisdiction. The Supreme Court of Colorado, finding that the sons were proper parties, had standing in the

[20] *Ibid.*

[21] *Ibid.*

[22] Ewing v. Colorado Farm Mut. Cas. Co., 133 Colo. 447, 296 P.2d 1040 (1956).

estate, and had an interest in the distribution of the property in the estate, held that the district court had state-wide jurisdiction to issue the order for disinterment and ordered that mandamus issue.[1]

Prior to the adoption of the new judicial amendment of 1965,[2] county courts had original jurisdiction in all matters of probate[3] and this jurisdiction was construed to be limited.[4] The judicial amendment of 1965, article VI, section 9 provides: "The district courts shall be trial courts of record with general jurisdiction and shall have original jurisdiction in all civil, probate, and criminal cases . . . ."

Subsequent to similar changes in their judicial structures, some states have held that in exercising probate jurisdiction, a court of general jurisdiction does not have general powers, but only those powers formerly exercised by county courts sitting in probate.[5] Because probate jurisdiction of county courts in Colorado was construed to be limited,[6] the effect of the fusion of probate jurisdiction with the district court's general jurisdiction seemed unclear. *Beere v. Miller,*[7] however, specifically resolved any doubts concerning the probate jurisdiction of the district courts when it said, "[I]t is to be noted that the petition . . . was filed subsequent to the effective date of . . . Article VI, section 9. The matter being then before the district court, that court has state-wide jurisdiction to issue orders of the kind sought here."[8] Therefore, although the *Beere* case could have interpreted the constitutional amendment as having no effect upon the limited nature of probate jurisdiction, the court instead held that the general jurisdiction of the district court extends to matters of probate under the new amendment.

Although in *Beere* the court was presented with only a juris-

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[1] Beere v. Miller, 403 P.2d 862 (Colo. 1965).

[2] COLO. CONST. art. VI, § 9.

[3] COLO. CONST. art. VI, § 23:

> County courts shall be courts of record and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, and such other civil and criminal jurisdiction as may be conferred by law; provided, such courts shall not have jurisdiction in any case where the debt, damage, or claim or value of property involved shall exceed two thousand dollars, except in cases relating to the estates of deceased persons.

[4] Hoff v. Ambruster, 125 Colo. 324, 244 P.2d 1069 (1952); Wright v. Wright, 11 Colo. App. 470, 53 Pac. 684 (1898); Marshall v. Marshall, 11 Colo. App. 505, 53 Pac. 617 (1898).

[5] *In re* Estate of Davis, 136 Cal. 590, 69 Pac. 412 (1902); *In re* Sprigg's Estate, 68 Mont. 92, 216 Pac. 1108 (1923); SIMES, MODEL PROBATE CODE p. 426 (1946).

[6] Hoff v. Ambruster, 125 Colo. 324, 244 P.2d 1069 (1952); Wright v. Wright, 11 Colo. App. 470, 53 Pac. 684 (1898); Marshall v. Marshall, 11 Colo. App. 505, 53 Pac. 617 (1898).

[7] 403 P.2d 862 (Colo. 1965).

[8] *Id.* at 863.

dictional question, strong dictum would indicate that exhumation would be proper in such a case. The court stated that,

> Without the evidence which they [the sons] seek to present to the court they may be deprived of their interest in the Texas property in which they have some claim. The extent of their interest would depend upon the question of survivorship, and the evidence on this vital issue is necessary for the court to make proper distribution under the will.[9]

The only apparent reason for the court to make the above-quoted statement would have been to express its approval of disinterment. The court, supplying the rationale for allowing disinterment, believed that a determination of which spouse survived was a vital issue and that justice demanded that exhumation be ordered to make proper distribution for the estate. After supplying the propriety for issuing the order for disinterment, the court stated that, "[the district] court has state-wide jurisdiction to issue orders of the kind sought here,"[10] indicating that a district court sitting in probate has the power to order a body exhumed and an autopsy performed.

There has never been a reported Colorado case in which the power of a court to exhume a body for evidentiary purposes has been in issue. However, other jurisdictions have recognized that after its interment the body is in the custody of the law,[11] and a disturbance of its resting place and its removal is subject to the control and direction of a court of equity in any case properly before it.[12]

Although the power of a court to order disinterment and autopsy or examination for evidential purposes has been denied in a few cases,[13] it has been recognized in many more.[14] The power to

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[9] *Ibid.*

[10] *Ibid.*

[11] Radomer Russ-Pol Unterstitzung Verein v. Posner, 176 Md. 332, 4 A.2d 743 (1939); Perth Amboy Gas Light Co. v. Kilek, 102 N.J. Eq. 588, 141 Atl. 745 (1928) ("A dead human body, once buried is the custody of the law. . . .").

[12] Radomer Russ-Pol Unterstitzung Verein v. Posner, 176 Md. 332, 4 A.2d 743 (1939); Perth Amboy Gas Light Co. v. Kilek, 102 N.J. Eq. 588, 141 Atl. 745 (1928) ("[A]nd removal and disturbance of such body is subject to the jurisdiction of a court of equity. . . ."); Sherrard v. Henry, 88 W. Va. 315, 106 S.E. 705 (1921).

[13] Tsaraclis v. Characklis, 176 Md. 28, 3 A.2d 725 (1939) (An orphan's court was held not to have authority to order a grave opened for inspection to determine whether charges for burial were excessive. It is to be noted, however, that the basis for the decision was that the orphan's court was one of specified powers and this power was not within those specified.); Homes v. New York, 180 Misc. 364, 42 N.Y.S.2d 359 (1943); Crispo v. St. Mary's Cemetery Ass'n, 258 App. Div. 1020, 17 N.Y.S.2d 70 (1940); *In re* Dinkel & Jewell Co., 198 N.Y.S. 831 (1923); Danahy v. Kellogg, 70 Misc. 25, 126 N.Y.S. 444, 445 (1910) ("This is the first application of this kind ever made, so far as we are aware. We are of the opinion the application of the defendant should be denied; but, in denying the motion, we base our decision squarely upon the absence of any right or authority in the court to grant the inspection asked.").

[14] The question of the right to exhume a body for the purpose of discovery is covered in the annotations at 21 A.L.R.2d 538 (1952).

order disinterment has been recognized to ascertain the cause of death,[15] to determine the nature of injuries,[16] to determine heirship,[17] and generally to determine any material facts in litigation.[18] However, the court will refuse to exercise the power where a proper case for its exercise is not made out.[19] A proper case is made out when there is strong reason to believe that fraud is involved,[20] when every other method of obtaining the evidence has been exhausted,[21] when the issue in question can be proven or disproven by an examination of the body,[22] when that issue is material and can be proven or refuted by no other evidence,[23] and when justice demands that the order should be made.[24] However, there is no universal rule to determine the propriety of issuing the order; each case depends upon its own facts and circumstances.[25] Perhaps Professor Wigmore most aptly states the propriety of ordering disinterment when he reasons that,

> The *exhumation* or the *autopsy of a corpse,* when useful to ascertain facts in litigation, should of course be performed. Reverence for the memory of those who have departed does not require us to abdicate the higher duty of doing justice to the living; and the order of a court of justice, exercising the power of the state in the communal interest, are not to be placed on the same level with

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[15] Radomer Russ-Pol Unterstitzung Verein v. Posner, 176 Md. 332, 4 A.2d 743 (1939); Painter v. United States Fid. & Guar. Co., 123 Md. 301, 91 Atl. 158 (1914); Kusky v. Laderbush, 96 N.H. 286, 74 A.2d 546 (1950); Perth Amboy Gas Light Co. v. Kilek, 102 N.J. Eq. 588, 141 Atl. 745 (1928).

[16] Kusky v. Laderbush, 96 N.H. 286, 74 A.2d 546 (1950).

[17] Ullendorff v. Brown, 156 Fla. 655, 24 So. 2d 37 (1945); Stastny v. Tachovsky, 178 Neb. 109, 132 N.W.2d 317 (1964); *In re* Percival, 101 S.C. 198, 85 S.E. 247 (1915).

[18] State v. Wood, 127 Me. 197, 142 Atl. 728 (1928); Stastny v. Tachovsky, 178 Neb. 109, 132 N.W.2d 317 (1964); State *ex rel.* Meyer v. Clifford, 81 Wash. 324, 142 Pac. 472 (1914).

[19] Perth Amboy Gas Light Co. v. Kilek, 102 N.J. Eq. 588, 141 Atl. 745 (1928) (good cause and urgent necessity for the exhumation of the body and an autopsy did not exist); State *ex rel.* Meyer v. Clifford, 81 Wash. 324, 142 Pac. 472, 474 (1914) (Where no strong showing is made that the facts sought would be established by an examination of such body it will be refused.).

[20] Ullendorff v. Brown, 156 Fla. 655, 24 So. 2d 37 (1945); Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446 (1879).

[21] Ullendorff v. Brown, *ibid.;* Grangers' Life Ins. Co. v. Brown, *ibid.;* Crispo v. St. Mary's Cemetery Ass'n, 258 App. Div. 1020, 17 N.Y.S. 70 (1940); State *ex rel.* Meyer v. Clifford, 81 Wash. 324, 142 Pac. 472 (1914).

[22] Ullendorff v. Brown, 156 Fla. 655, 24 So. 2d 37 (1945); Stastny v. Tachovsky, 178 Neb. 109, 132 N.W.2d 317 (1964); Kusky v. Laderbush, 96 N.H. 286, 74 A.2d 546 (1950).

[23] Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446 (1879); State *ex rel.* Meyer v. Clifford, 81 Wash. 324, 142 Pac. 472 (1914).

[24] Ullendorff v. Brown, 156 Fla. 655, 24 So. 2d 37 (1945); Painter v. United States Fid. & Guar. Co., 123 Md. 301, 91 Atl. 158 (1914); Grangers' Life Ins. Co. v. Brown, *ibid.;* Stastny v. Tachovsky, 178 Neb. 109, 132 N.W.2d 317 (1964); Kusky v. Laderbush, 96 N.H. 286, 74 A.2d 546 (1950); *In re* Dinkel & Jewel Co., 198 N.Y.S. 831 (1923); State *ex rel.* Meyer v. Clifford, *ibid.*

[25] Bunol v. Bunol, 12 La. App. 675, 127 So. 70 (1930); Lavigne v. Wilkinson, 80 N.H. 221, 116 Atl. 32 (1921); Moore v. Sheafer, 282 Pa. 360, 127 Atl. 784 (1925).

> the acts of an unlicensed and self-seeking intruder upon hallowed ground.[26]

Beere v. Miller[27] also contains an interesting procedural issue which the dissenting opinion of Mr. Justice McWilliams points out. To avail themselves of discovery under Rule 34 of the Colorado Rules of Civil Procedure,[28] the petitioners must be parties to the probate proceeding.[29] Generally one becomes a party to a probate proceeding by being named in the petition for probate[30] or by filing a caveat to the will.[31] Of course, one could also become a party by intervening in the probate proceeding.[32] The contention of the dissenting opinion is that instead of availing themselves of any of the above procedures, the petitioners merely alleged in their petition to exhume that they were interested parties.

The majority opinion did not discuss this procedural point and held that the petitioners were proper parties to the proceeding. The majority may have reasoned that a probate proceeding is a proceeding in rem in which any interested party may take part.[33] Considering the fact that a person in interest is defined by statute[34] as an "heir, legatee, devisee, spouse, and his personal representative, and creditor, or any other person having a property right in or claim against the estate of a decedent . . . ," it is obvious that the petitioners met the requirements since they qualify as "any other person having a property right." The majority noted,

> If, therefore, the evidence sought by these petitioners established that their father survived their stepmother, title to the property would vest in him as a surviving joint tenant and petitioners would have an interest in either the entirety of the property or possibly in

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[26] 8 WIGMORE, EVIDENCE § 2221 at 197 (McNaughton rev. 1961).

[27] 403 P.2d 862 (Colo. 1965).

[28] Upon motion of any party showing good cause therefore and upon notice to all other parties, and subject to the provisions of rule 30(b), the court in which an action is pending may (1) order any party to produce and, permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted under rule 26(b) and which are in his possession, custody, or control. . . .

[29] Quemos Theatre Co. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949 (D.N.J. 1940) (Rule 34 authorizing production of documents and things for inspection, is limited to parties); Park Bridge Corp. v. Elias, 3 F.R.D. 93 (D.N.Y. 1943).

[30] COLO. REV. STAT. § 153-5-22 (1963); PARKS, COLORADO PROBATE PRACTICE MANUAL § 4.5 at 75 (1964); "It would appear that the petition for probate functions as the complaint, that the caveat is the answer. . . ."

[31] COLO. REV. STAT. § 153-5-33 (1963); PARKS, *op. cit. supra* note 30, § 4.5 (1964).

[32] COLO. R. CIV. P. 24.

[33] Hoff v. Ambruster, 125 Colo. 324, 244 P.2d 1069 (1952); ATKINSON, WILLS § 95 at 493 (1953); 43 MICH. L. REV. 675 (1945).

[34] COLO. REV. STAT. § 153-1-1 (12) (1963).

one-half thereof, either by Texas law or under the terms of the will.[35]

The majority also may have taken into consideration the fact that the executor seems to have erred in not serving notice upon the petitioners as heirs of a devisee which would have made them parties. The executor was apparently acting under the erroneous assumption that the Uniform Simultaneous Death Act[36] was controlling. This act obviously does not control when there is sufficent evidence to determine which person survived.[37]

Evidence sufficent to controvert the applicability of the Uniform Simultaneous Death Act, thus enabling the district court to make a proper distribution under the will, would be contingent upon the exhumation and autopsy of the decedent's remains within a comparatively short period of time following her death. The urgency inherent in this situation may well have been an additional factor in the court's dispensing with strict adherence to the procedural rules.

In holding that district courts have probate jurisdiction as part of their general jurisdiction, the *Beere* decision has reached an excellent result. Mr. Howard Parks in his Colorado Probate Practice Manual seems to have predicted this result stating that "there appears to be no probability that the supreme court will reduce the district courts to courts of limited jurisdiction when sitting in probate, as has occurred in some states."[38] Mrs. Parks also believes that, [T]he revised judiciary structure of the state will eliminate many of the problems which existed heretofore because the county courts were courts of limited jurisdiction."[39] This contention seems to be upheld by the situation presented in the *Beere* case. A county court with limited jurisdiction could not exhume a body located in another county while a district court, having state-wide jurisdiction, is able to order exhumation incident to a probate proceeding. Thus, a district court sitting in probate could receive evidence needed for a proper distribution of the estate.

It would seem that the *Beere* case could be cited with confidence as an example of approval by the Supreme Court of Colorado of disinterment for evidentiary purposes when a proper case is before it. As has been pointed out, other jurisdictions have recognized the power of a court to order disinterment for evidentiary purposes and

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[35] 403 P.2d 862, 863 (Colo. 1965).

[36] COLO. REV. STAT. §§ 153-18-1 to -8.

[37] Sauers v. Stolz, 121 Colo. 456, 218 P.2d 741 (1950).

[38] PARKS, *op. cit. supra* note 30, § 1.9 at 7 (1964).

[39] *Ibid.*

now it seems that there is also a Colorado case which could be used as precedent for the exercise of such a power.

Although the majority of the court did not discuss the procedural point highlighted in the dissenting opinion, it would seem, at least by implication, that liberal procedures in probate courts could be followed. The majority apparently believed that any interested person could become a party to a probate proceeding by alleging an interest in the estate and showing that his interest may be adversely affected. It should be noted that the petitioners in the *Beere* case did not become parties to the probate proceeding by being named in the petition for probate, nor by filing a caveat, nor by intervening in the proceeding, but rather by merely alleging their interest in the petition to exhume. This result follows the principle that probate procedures are established for the purpose of providing an orderly manner in which to conduct the administration of estates and should not be invoked to obstruct this goal.

Jon L. Lawritson